



# German Works Councils – A Model for South African Workplace Forums?

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*submitted by*

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## I. INTRODUCTION

For companies worldwide, globalisation and the development of a world market require cooperation and mutual problem solving between the management and workers in order to be competitive and prosperous. Those countries which have prospered worldwide such as Japan, Germany and Sweden are those who have implemented statutory employee participation structures to foster such a partnership.<sup>1</sup> It is now mostly recognised that employees are stakeholders of the corporation that can contribute to the shareholders' interests of increasing the company's profit. A cooperative relationship between management and workers in which management takes the workers' interest into account therefore is part of Good Corporate Governance not only for moral but also for economic reasons. As Davis and Le Roux summarise this understanding, 'the satisfaction of employees will lead to greater productivity and thus to increased profits, in this way maximising the interests of both employees and shareholders'.<sup>2</sup>

Employee participation can be defined as a process that recognises the needs and rights of employees – individually as well as collectively – to participate with management in organisational decision making beyond that what is usually associated with collective bargaining.<sup>3</sup> Within a corporation, participation can take place at board level, at workstation level between supervisor and its employees and at workplace level in the form of elected worker representation bodies. In addition, there is an evolving variety of employee participation schemes, including profit sharing, gain sharing and employee share ownership.<sup>4</sup>

The parties involved in employee participation have different interests and benefit expectations: Employers are interested in generating higher efficiency in order to increase the company's profit, employees and unions are more concerned to increase their influence over decision making in the workplace to improve working conditions, and the state is generally more interested in achieving goals of social integration but also the companies' wealth to improve the economy and tax income.<sup>5</sup>

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<sup>1</sup> Explanatory Memorandum (1995) ILJ 278 at 310.

<sup>2</sup> D Davis and M Le Roux 'Changing the role of the corporation: A journey away from adversarialism' (2012) *Acta Juridica* 306 at 310.

<sup>3</sup> F Steadman 'Workplace Forums in South Africa: A Critical Analysis (2004) 25 ILJ 1170 at 1180.

<sup>4</sup> *Ibid.*

<sup>5</sup> See also H Knudsen *Employee Participation in Europe* (1995) 15.

In South Africa, the historically adversarial confrontation climate is still not overcome and still is a hindrance to effective employee participation in the workplace. One of the objectives of the government's Reconstruction and Development Programme (RDP) was to facilitate a shift from adversarial towards more cooperative and participative industrial relations. This can be achieved with labour law, as labour law is concerned with the regulation of social power which is described as the capacity to effectively direct the behaviour of others.<sup>6</sup>

The Labour Relations Act 66 of 1995 ("LRA") was published on 10 February 1995 as a significant milestone on the path towards a post-apartheid South Africa based on the RDP. The Act tries to balance the goal of global competitiveness and with that of a stable and redistributive growth and is based on three pillars: The National Economic Development and Labour Council (NEDLAC) on a macro level, bargaining councils on sectoral level and workplace forums on plant level.<sup>7</sup> One of its new features was the introduction of a statutory employee participation structure called a workplace forum with the aim to facilitate the shift from adversarial bargaining to joint problem-solving and participation by employees on selected issues in order to advance economic development and global competitiveness, social justice, labour peace and the democratisation of the workplace. The drafters of the LRA based the workplace forum system inter alia on the positive and successful statutory employee participation structures in Germany, namely works councils. 22 years after the LRA and Chapter 5 came into force there are only few workplace forums established in terms of the Act and relations between trade unions, employers and employees are still adversarial as was seen in the Marikana massacres in 2012. Despite this, the legislator has not made any changes to the provisions yet.

This dissertation compares the employee participation structures in South Africa with those in Germany and analyses potential changes – in theory and in praxis – to make the institution of the workplace forum more attractive both to trade unions and employers. It further identifies the relevant criteria for transplants of laws from one legal system to another<sup>8</sup> and applies these criteria in the context of employee participation.

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<sup>6</sup> P Davies and M Freedland *Kahn-Freund's Labour and the Law* (1983) 14.

<sup>7</sup> G Klerck 'Adversarial Participation and Antagonistic Cooperation? Workplace Forums, Employee Participation and Lean Production' (1999) *Transformation* at 1.

<sup>8</sup> As identified by O Kahn Freund 'On Uses and Misuses of Comparative Law' (1974) 37 *MLR* 635; B Hepple 'Can Collective Labour Law Transplants Work? The South African example' (1999) 20 *ILJ* 1; R Bean 'Comparative Industrial Relations: an introduction to cross-national perspectives' (1985).

Chapter 2 will depict the statutory framework of workplace forums in South Africa, including the history of employee participation, the relationship between workplace forums and trade unions and some of the reasons for the failure of the system.

The third chapter provides an overview of the provisions regulating works councils in Germany, their history and the way in which trade unions and works council successful cooperate and benefit from each other.

Subsequently, the fourth chapter deals with the prerequisites for a successful transfer of laws from one legal system to another and answers the question, whether in case of employee participation in Germany and South Africa, these requirements are met. This is of particular importance as the drafters of the LRA based Chapter 5 on the works council system in Germany, partly adapting it to the South African background though.

With reference to the previous chapters, the fifth chapter then proposes several amendments to the LRA which may make the workplace forum more attractive for all affected parties. Some of the proposals stem from the positive German experience, others are specifically tailored to the South African context of adversarialism, high unemployment and an economic recession.

Lastly, the sixth chapter comprises a summary of the findings and a conclusion.

## **II. WORKPLACE FORUMS IN SOUTH AFRICA**

Workplace forums were introduced into the South African legal system in 1995 with the introduction of the new LRA. They can be established in workplaces with more than 100 employees on application to the Commission for Conciliation, Mediation and Arbitration (“CCMA”) of a representative trade union. The LRA provides workplace forums with the right to consultation, the right to joint decision making and to information in order to give employees a voice in managerial decision making. This Chapter firstly deals with the historical background of employee participation in South Africa during apartheid and gives an overview of the drafting process of the LRA as well as the reasons for the introduction of workplace forums into the new LRA. Thereafter, the statutory framework of workplace forums as well as the relationship between trade unions and workplace forums in South Africa will be discussed. The chapter

concludes with an outline of some of the reasons for the failure of the workplace forums system that are suggested by South African and international labour lawyers.

## **1. Historical background**

### **a) Employee participation during apartheid**

Historically, workers in South Africa, especially black workers, fought against an oppressive regime and, in the absence of political rights, strikes were often violent. Labour legislation was based on racial categorisation and discrimination and there was parallel labour legislation for blacks, the Black Labour Relations Regulation Act 48 of 1953, and whites, the Industrial Conciliation Act, later renamed the Labour Relations Act 28 of 1956. Trade unions were racially divided and black workers mostly were precluded from joining trade unions. Those unions that admitted blacks as members could not become parties to industrial councils.<sup>9</sup> Also, the definition of employees in terms of the Industrial Conciliations Act did not include Africans. The government introduced bodies such as the Central Black Labour Council, works committees and liaison committees in order to exclude black workers. In 1980, 2,745 liaison committees, 327 works committees and 5 coordinating committees had been established.<sup>10</sup> This formal exclusion of black workers, however, did not prevent them from establishing trade unions underground in order to protect themselves. In many instances the committees built the bases from which the independent unions were launched in the 1970s. This South African history of racial oppression and exclusion in the form of compromised forms of interest representations for black workers have resulted in a deep-seated mistrust of such forums which until today does not seem to have been overcome and in a strong commitment to collective bargaining through independent forums.<sup>11</sup>

The recommendations by the Wiehahn Commission released on 1 May 1979 prompted a change to the labour laws: The Commission proposed to give black employees full trade union rights and permit their unions to use industrial councils, while at the same time incorporating African workers into the system of control and discipline that already existed in relation to white,

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<sup>9</sup> ME Manamela 'Regulating workplace forums in South Africa' (2002) SA Merc LJ 728 at 729.

<sup>10</sup> Klerck op cit (n7) 8.

<sup>11</sup> Klerck op cit (n7) 8.



coloured and indian workers.<sup>12</sup> It also recommended registration of unions in order to intensify state control. Thereafter, black workers gained full trade union rights as well as permission to use industrial councils. The situation of black employees further improved when South Africa re-entered into the international market, labour rights were entrenched in the constitution and when the LRA gave effect to the recommendations passed by the International Labour Organisation (“ILO”). Of special importance for the following analysis is the ILO Recommendation 94/1952 on Co-operation at the Level of the Undertaking and Recommendation 129/1967 on Communication within the Undertaking. Recommendation 94 states that ‘appropriate steps should be taken to promote consultation and co-operation between employers and workers at the level of the undertaking on matters of mutual concern not within the scope of collective bargaining machinery’. Such cooperation should, in accordance with national custom or practice, be promoted by laws or regulations which would establish bodies for consultation and co-operation and determine the scope, functions, structure and methods of operation as may be appropriate to the conditions in the various undertakings.

## **b) Drafting process of the LRA**

After the election of the first democratic government in April 1994, the Minister of Labour on 8 August 1994 appointed a Ministerial Legal Task Team (“Task Team”) under the convenorship of Halton Cheadle to prepare a negotiating document in draft Bill form to initiate public discussion about a far reaching labour law reform. The task team consisted of several highly respected South African Labour lawyers and was assisted throughout the drafting process by the ILO and three international experts one of which was Manfred Weiss, a German Labour Law and Comparative Law Professor at the University of Frankfurt. In the Task Team’s letter of appointment workplace forums and co-determination were not explicitly mentioned but it stated that the draft Bill should give effect to the RDP.<sup>13</sup> The RDP White Paper in section 3.11.4. refers to employee participation in the following words: ‘Industrial democracy will facilitate greater worker participation and decision making in the workplace. The empowerment of workers will be enhanced through access to company information. [...]’.<sup>14</sup> At the same time, chapter 5 was explicitly drafted to improve productivity and quality levels to facilitate South Africa’s re-entry into international

<sup>12</sup> Manamela op cit (n9) 729.

<sup>13</sup> V Satgar ‘The LRA and work-place-forums: Legislative provisions, origins, and transformative possibilities’ Law, Democracy & Development Vol 2, No 1 (1998) at 51.

<sup>14</sup> <http://www.gov.za/sites/www.gov.za/files/governmentgazetteid16085.pdf>, accessed on 06.08.2017.

markets. In an interview with Amanda Armstrong, a member of the Task Team, she said that ‘when we looked at other countries the more successful way of restructuring entailed co-determination rather than adversarial relations and hence the main model for us was Germany’.<sup>15</sup>

The draft Bill was presented at the NEDLAC’s Labour Market Chamber for consideration by labour, business and government on 2 February 1995. The social partners, NEDLAC, the Public Service Bargaining Council and the Education Labour Relations Council, commented on the draft bill. During a three months period of negotiations, the main issues of contention were the union trigger, the items for joint decision-making, the information disclosure provisions and the relationship between workplace forums and collective bargaining. The government was committed to a statutory introduction of worker representation in the workplace, though highlighting some areas which it believed required more intensive consideration such as the proposal that workplace forums are employee- and not trade union based and that only representative unions may trigger the establishment of the workplace forum. Labour demanded a union-based forum, fearing that trade unions and shop steward structures could be undermined by workplace forums. They further demanded a provision that enables the dissolution of an established workplace forum. Business essentially argued against the union trigger and wanted to establish employer-initiated workplace forums.<sup>16</sup> The final bill strives to strike a balance between these conflicting demands and interests of management and labour by providing for forums that are not merely meant to be trade union extensions but over which representative trade unions have extensive control.

## **2. Purpose of workplace forums in the South African context**

Pursuant to section 1(d)(iii) of the LRA, one of the main purposes of the LRA is to promote employee participation in decision-making in the workplace. This was supposed to be achieved through the introduction of workplace forums as statutory employee participation structures in the workplace.

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<sup>15</sup> Satgar op cit (n13) 52.

<sup>16</sup> Satgar op cit (n13) 54.

The purpose of workplace forums was both ‘transformative’ and ‘best practice’<sup>17</sup>: The legislator sought to facilitate a shift from adversarialism to cooperative problem-solving in a more facilitate the reconstruction and development of post-apartheid South Africa.

The Task Team, when proposing the workplace forum system, presumed that in order to improve efficiency and productivity and thereby profitability, an employee participation system as a ‘second channel’ of industrial relations is needed.<sup>18</sup> Referring to economically successful countries such as Japan, Germany and Sweden, worker participation is seen as the key factor to increased productivity and therefore competitiveness in the global market. The aim of the introduction of workplace forums into the South African labour law system was to ‘facilitate a shift, at the workplace, from adversarial collective bargaining on all matters to joint problem-solving and participation on certain subjects.’<sup>19</sup> This ‘second channel’ is not supposed to undermine collective bargaining but to supplement it by way of giving the employees a voice in managerial decision making in non-wage matters, such as restructuring, the introduction of new technologies and works methods, changes in the organisation of work, physical conditions of work and health and safety.<sup>20</sup> According to studies of similar structures in the U.S. and European countries, employee participation contributes to economic performance of companies by way of improving communication between management and workforce as well as the quality of decisions and by facilitating the implementation of decisions in workplaces.<sup>21</sup> Based on the assumption that a compulsory imposition of employee participation structures would be unsuccessful, the LRA provides that workplace forums can only be triggered by representative trade unions even though it explicitly states that the forum is supposed to represent all employees in the workplace and not only trade union members. There are two exceptions to this general rule: First, senior managerial employees are excluded from the scope of workplace forums and secondly, if the workplace forum is trade union based in terms of section 81 of the LRA, the representative trade union chooses the members of the forum from amongst its elected representatives, ie shop stewards, in the workplace.<sup>22</sup> The LRA provides for three forms of participation being information sharing, consultation and joint decision-making as well as the

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<sup>17</sup> Steadman op cit (n3) 1190.

<sup>18</sup> Explanatory Memorandum op cit (n1) 311.

<sup>19</sup> Ibid.

<sup>20</sup> Explanatory Memorandum op cit (n1) 310.

<sup>21</sup> Explanatory Memorandum op cit (n1) 312.

<sup>22</sup> Section 81(2) of the LRA.

establishment of a deadlock-breaking mechanism which includes arbitration and mediation. Where a dispute is referred to arbitration, as it is the case only in matters of joint decision-making, the right to strike and lockout is removed.<sup>23</sup> Further, as workplace forums are based on voluntarism, the LRA does not impose a standardised form of workplace forums but provides a floor of rights above which the employer and the representative trade union can agree on various forms of schemes.<sup>24</sup>

To summarise, the drafters of the LRA based the introduction of workplace forums on the following principle assumptions: First, there is a qualitative difference between distributive issues (such as wages and conditions of employment) and productivity issues (such as changes in the organisation of work and health and safety). This goes with the assertion that production issues can best be dealt with at the level of the individual workplaces. Further, the drafters assumed that qualitative issues are predominantly consensual, whereas quantitative issues are mainly conflictual. Therefore, the traditional collective bargaining structures are regarded as unsuited to solve production-related issues and disputes. A strict and clear separation between production and distributive issues can only be achieved through the establishment of two separate institutions. Lastly, the drafters claimed that the concepts of participation, cooperation and increased productivity are interdependent.<sup>25</sup>

#### **a) Step away from adversarialism**

Traditionally, there is a fundamental conflict between labour and profit: workers seek to increase their wages which inevitably reduces the shareholders' return on capital. Both common law as well as the Companies Act 71 of 2008 in section 76(3)(b) require the directors to act in the best interests of the company. This leads to the question discussed in Corporate Governance in whose interests a corporation generally should operate. This debate can be traced back to an exchange between Berle and Dodd in 1931 at Harvard University. Berle suggested that the directors of a company exercise their power solely in the interests of the shareholders of the company as the only purpose of the company is to maximise the shareholders' profits (so called 'shareholder-primacy approach').<sup>26</sup> Shareholders provide the company with capital and as residual claimants

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<sup>23</sup> Explanatory Memorandum op cit (n1) 314.

<sup>24</sup> Klerck op cit (n7) 9.

<sup>25</sup> Klerck op cit (n7) 15.

<sup>26</sup> AA Berle 'Corporate Powers as Powers in Trust' (1931) 44 Harvard Law Review 1049.

of whatever is left over after all other claims have been paid assume the risk of the business. By contrast, Dodd asserted that a corporation is not conducted in a vacuum and that other stakeholders such as employees, consumers or the society have to be taken into account. He contended that a commitment to the interests of other stakeholders such as employees or customers will ultimately benefit the shareholders as the employees' satisfaction can lead to greater productivity and thus increase the shareholders' profit.<sup>27</sup> The Companies Act follows this so-called 'enlightened shareholder model'<sup>28</sup>. It requires directors to take other stakeholders' interests into account, provided that these are subordinated to the primary role of profit maximisation.

Although the employees' satisfaction is generally recognised as a key factor to a company's long-term sustainability and profitability, the relationship between labour and profit is still adversarial. The South African labour legislation is based upon a liberal market system in which collective bargaining between trade unions and employers' organisations is the predominant system of employee participation.<sup>29</sup> The LRA, however, does not impose a duty to bargain on the employer, it is a voluntary system that is based on the exercise of economic power. It is therefore not the interference of the law, but the balance of forces that determines the outcome.<sup>30</sup> This approach to collective bargaining was introduced by Kahn-Freund and is based on a 'collective laissez-faire' approach.<sup>31</sup> The liberal market system is characterised by an adversarial relationship between employees and employers. Negotiations often take place in bad faith, leading to violent industrial action measures.

Brand describes the manner of negotiations between trade unions and employers as follows:<sup>32</sup> Both parties take the view that the higher their initial demand, the more likely it is that the negotiations will turn out in their favour which often makes it impossible from the beginning to breach the gap between their positions. At the bargaining table, no serious dialogue takes place and unions often assume that real negotiations will only take place once the employer is faced with a strike action. Negotiations are therefore only seen as a pointless formality and trade unions aim at referring the dispute to the CCMA as soon as possible. The often violent strike actions are

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<sup>27</sup> EM Dodd 'For whom are corporate managers the trustees?' (1931-1932) 45 Harvard Law Review 1145.

<sup>28</sup> Davis, Le Roux op cit (n2) 311.

<sup>29</sup> Davis, Le Roux op cit (n2) 316.

<sup>30</sup> Ibid.

<sup>31</sup> D Du Toit 'What is the Future of Collective Bargaining (And Labour Law) in South Africa?' (2007) ILJ 1405 407.

<sup>32</sup> As cited in Davis, Le Roux op cit (n2) 319, 320.

counterproductive to both employees and employers: Trade unions do not have the means to sustain their strikes for a longer period and employers are faced with high costs due to damage to property, the expenses of hiring private security firms and the costs incurred by litigation.<sup>33</sup> In this South African model of collective bargaining; ‘deep seated antagonism rather than any form of partnership or dialogue operates to solve the dispute’ which makes a ‘win-win’ outcome impossible.<sup>34</sup> Klerck once said that in the South African history of adversarialism and deep seated mistrust, a ‘genuine cooperation between capital and labour [...] is bound to be of an ephemeral nature.’<sup>35</sup>

Workplace forums were, inter alia, introduced to facilitate the move away from this rigid adversarial ‘winner takes all’ model of labour relations, sourced in a history of class conflict overlaid by racist rules. The South African climate of violent strike action, high unemployment levels,<sup>36</sup> political instability and a recessionary economic climate has placed companies under increasing pressure to reduce their employment costs and at the same time it has deterred foreign investment.

In contrast, the ‘coordinated market system’ is found in European countries such as Germany.<sup>37</sup> This system recognises that employees are core stakeholders of a company who contribute to the long-terms sustainability of the company and thus to the aim of profit maximisation. The German system which is regarded as the ‘first and most highly developed’ model of worker participation<sup>38</sup> institutionalises the employees’ views within the company on two levels, on plant level and on company level, and is therefore often referred to as a dual channel system: On company level, legislation<sup>39</sup> provides for labour representation on the supervisory board which is institutionally separated from the management board (the so called ‘two-tier system’). The main functions of the supervisory board are the appointment/election of the members of the board of directors and the supervision and control of management decisions

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<sup>33</sup> Davis, Le Roux op cit (n2) 320.

<sup>34</sup> Ibid.

<sup>35</sup> Klerck op cit (n7) 16.

<sup>36</sup> In the first quarter of 2017, the official unemployment rate was 27,7 %, see <http://www.statssa.gov.za/>, accessed on 22.07.2017.

<sup>37</sup> Davis, Le Roux op cit (n2) 315.

<sup>38</sup> M Biasi ‘On the Uses and Misuses of Worker Participation: Different Forms for Different Aims of Employee Involvement’ (2014) IJCLLI 459, 461.

<sup>39</sup> Namely the Co-Determination Act (‘Mitbestimmungsgesetz’) and the One-Third Participation Act (‘Drittelbeteiligungsgesetz’).

taken by the board of directors.<sup>40</sup> The number of employee representatives depends on the number of employees of the company but can amount up to 50 % of the members of supervisory boards.<sup>41</sup> On plant level, employee participation effectively takes place in the form of works councils. As a general rule, the relationship between workers and labour is more harmonious in coordinated market systems than in liberal market systems.<sup>42</sup> Furthermore, co-determination has a significant impact on the directors' compensation packages.<sup>43</sup>

It is against this background that workplace forums were introduced in the post-apartheid era. Employee consultation and joint decision-making in production issues are aimed at developing a cooperative dialogue at the workplace and breaking through the adversarial confrontation climate in the collective bargaining process, following the German archetype of works councils and cooperation.

## **b) Changing conditions for trade unions**

Since the 1970s, globalisation has led to structural changes in the production process as well as changes in the labour market. Globally, trade unions today face significant challenges. In the South African context, increasing unemployment levels as well as the trend towards non-unionised and atypical forms of employment such as temporary and part-time employment and disguised employment relationships make it difficult for trade unions to organise in the workforce, leading to a decline in trade union membership.<sup>44</sup> As Bob Hepple argues, the collective bargaining system in South Africa depends on the effective organisation by workers. He points out that greater legal rights to organise do not help the contemporary labour force consisting of temporary workers, part time worker and 'self-employed' workers.<sup>45</sup> A decline in trade union density leads to a decline in collective bargaining coverage meaning the percentage of employees and employers subject to collective agreements.<sup>46</sup> To counteract this development, many countries including South Africa have introduced extension mechanisms.<sup>47</sup>

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<sup>40</sup> Biasi op cit (n38) 464.

<sup>41</sup> See Biasi op cit (n38) 465.

<sup>42</sup> Davis, Le Roux op cit (n2) 311.

<sup>43</sup> Davis, Le Roux op cit (n2) 316.

<sup>44</sup> Du Toit op cit (n31) 1412.

<sup>45</sup> B Hepple 'The Future of Labour Law' (1996) 17 Comp Labour Law & Policy Journal 626.

<sup>46</sup> Du Toit op cit (n31) 1414.

<sup>47</sup> The LRA provides for the extension of collective agreements to non-parties by the parties to the collective agreement (section 23(1)(d)) as well as by a bargaining council (section 32).

These changing conditions weaken unions and produce an imbalance of bargaining power between the employer and trade unions which leads to employers pressuring for decentralised individual bargaining.<sup>48</sup> In Bogg's words, 'the regulatory implication of the decline in collective bargaining is the increasing "procedural individualization" of the employment relation, involving a power shift to employers unilaterally determining contractual relationships on a standardized basis.'<sup>49</sup>

In the middle of August 2012 a dispute over wages between rock drill operators and Lonmin management culminated in the events of the Marikana massacre, resulting in 34 miners being shot by members of the SA Police Service (SAPS).<sup>50</sup> One of the reasons for what happened at Marikana was the collapse of the system of labour relations, especially of the collective bargaining system.

In today's trade union system, shop stewards are well paid and often sacrifice the claims of low-skilled workers to service special interests such as those of highly skilled workers.<sup>51</sup> In the events of Marikana, rock drill operators did not feel represented by their traditional trade union, the National Union of Mineworkers (NUM), and chose to be represented by a newly established minority union called Association of Mineworkers and Construction Union (AMCU). At the time of the massacre, AMCU had limited organisational rights at one of Lonmin's three mines but the NUM was recognised for the purposes of collective bargaining at Lonmin's mining operation as a whole.<sup>52</sup>

In the course of negotiations between NUM and management at Implats, another platinum mine, in the beginning of 2012 shortly before the Marikana massacre, the trade union negotiators rejected a management offer to adjust wages of rock drill operators in favour of a uniformal increase across all occupations by 10 %. Management in consultation with NUM subsequently

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<sup>48</sup> Du Toit op cit (n31) 1416.

<sup>49</sup> AL Bogg, 'Representation of Employees in Collective Bargaining within the Firm: Voluntarism in the UK' Report to the XVIIth International Congress of Comparative Law July 2006, Electronic Journal of Comparative Law vol 10.3 3, available at <https://www.ejcl.org/103/art103-3.pdf>, accessed on 22.07.2017.

<sup>50</sup> For further background information see D Bruce 'Summary and Analysis of the report of the Marikana Commission of Inquiry', Council for the advancement of the South African Constitution, available at <https://www.casac.org.za/wp-content/uploads/2015/02/Summary-and-Analysis-of-the-Report-of-the-Marikana-Commission-of-Inquiry.pdf>, accessed on 24.07.2017.

<sup>51</sup> M Brassey 'Labour Law after Marikana: Is Institutionalized Collective Bargaining in SA Wilting? If So, Should We Be Glad or Sad?' (2013) 34 ILJ 823, 833.

<sup>52</sup> J Theron, S Godfrey, E Fergus 'Organisational and collective bargaining rights through the lens of Marikana' (2015) 36 ILJ 849, 853.



decided to increase the wages of miners (being first-line supervisors of work teams) by 18 %. The rock drill operators, obviously aggrieved by this, concluded that there was enough money available and that the NUM negotiators were more concerned with enhancing the occupation they were in being the most skilled grades. Rock drill operators did not feel represented by their trade union and went on strike, demanding an adjustment of their wages by 18 % as well as that management no longer negotiates with NUM.<sup>53</sup> The strikers were successful and thereafter many workers resigned from the NUM and joined AMCU.

Inspired by the events at Implats, in June 2012 rock drill operators at Lonmin also demanded an increase in their wages and explicitly did not want management to involve any trade union in the negotiation. When Lonmin management informed the NUM and AMCU offices about the rock drill operators' demand, neither of them wanted to get involved in the discussions.<sup>54</sup> The workers established their own informal strike committees in order to carry forward their demands.<sup>55</sup> The dissatisfaction of the workers resulted in an unprotected strike that heightened the rivalry between AMCU and NUM and resulted in 34 mineworkers being killed. The strikes were driven by workers against union advice and without any union endorsement or support. NUM was considered the sweetheart union of management that was increasingly concerned with white-collar workers. Shop stewards were being paid by management, received a company petrol card, a company vehicle and a company cell phone. They no longer worked underground and therefore were freed from the burdensome labour conditions that had encouraged them to join the trade union in the first place. They had a lifestyle change and would do anything to not lose their position and lost touch with the workers doing the underground work in the mines.<sup>56</sup> The accountability of shop stewards to members has weakened and pressure to account to leaders higher up as well as to management has intensified. Trade unions no longer met the aspirations of low-skilled and low-paid workers and formal bargaining representatives were replaced with informal groupings of workers.<sup>57</sup> This is the opposite of the role of shop

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<sup>53</sup> Theron, Godfrey, Fergus op cit (n52) 852.

<sup>54</sup> Ibid.

<sup>55</sup> T Ngcukaitobi 'Strike Law, Structural Violence and Inequality in the Platinum Hills of Marikana' (2013) 34 ILJ 836, 838.

<sup>56</sup> G Marinovich 'Conflict of Interest, Inc: Mining unions' leaders were representing their members while in corporations' pay', Daily Maverick 24 April 2013 available at <https://www.dailymaverick.co.za/article/2013-04-24-conflict-of-interest-inc-mining-unions-leaders-were-representing-their-members-while-in-corporations-pay/#.WXXpP-IBrIU> accessed on 24.07.2017.

<sup>57</sup> Ngcukaitobi op cit (n55) 852.

stewards when the unions began to organise in the early 1970s: Back then, they were highly committed, low paid and did hard and dangerous work that involved rushing from one township meeting to another to serve the union members' needs.<sup>58</sup>

As was seen in the events of Marikana, the majoritarian approach to collective bargaining implemented in the LRA, referred to as the 'winner-takes all approach',<sup>59</sup> protects the interests of well-established and larger unions, making it difficult for minority unions to raise their voice. At the same time, the emergence of smaller unions and informal workers' committees has reduced the big unions' bargaining power, leading to a loss of influence.<sup>60</sup>

Therefore, it is suggested that labour law should shift its focus to contemporary forms of worker organisation and collective interaction. The aim of the introduction of workplace forums was to fill the vacuum left by the recession and the failure of the collective bargaining system. They were aimed at playing a significant role in regulating conditions of employment in a context of decentralization of production and the erosion of collective bargaining, especially where unions lack the capacity to bargain at workplace level.

### **3. The South African legal framework**

#### **a) Application for establishment of a workplace forum**

A workplace forum may be established in any workplace with more than 100 employees where there is no existing functioning workplace forum.<sup>61</sup> Workplace forums in terms of Chapter 5 of the LRA may only be established in the private sector, whereas the establishment of workplace forums in the public sector may be regulated in a schedule promulgated by the Minister for the Public Service and Administration in terms of section 207(4) of the LRA.<sup>62</sup>

In the private sector, a 'workplace' as defined in section 213 of the LRA generally means the place or places where the employees of an employer work. However, if an employer carries on business in two or more operations, each operation may be considered a separate workplace, provided these operations are independent of one another by reason of their size, function or

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<sup>58</sup> Brassey op cit (n51) 832.

<sup>59</sup> Ngcukaitobi op cit (n55) 854.

<sup>60</sup> Ngcukaitobi op cit (n55) 856.

<sup>61</sup> Section 80(1), (5)(b)(iii) of the LRA.

<sup>62</sup> Section 80(12) of the LRA.

organisation. This means that there can be more than one workplace per geographic location and a workplace may be made up of more than one geographic location. Whereas trade unions would prefer a narrow definition in order to obtain representivity easily, employers would prefer a broader definition.<sup>63</sup>

Employees are defined in section 78(a) of the LRA as any person who is employed in a workplace, excluding managerial employees who have the authority in terms of their contract or status to represent the employer in dealings with the workplace forum or to determine policy and take decisions on behalf of the employer that may conflict with the representation of employees in the workplace.

Only a representative trade union may apply to the Commission for Conciliation, Mediation and Arbitration (“CCMA”) for the establishment of a workplace forum.<sup>64</sup> A ‘representative trade union’, for the purposes of Chapter 5, means a ‘registered trade union, or two or more registered trade unions acting jointly, that have as members the majority of the employees employed by an employer in the workplace’<sup>65</sup>. Pursuant to item 10 of Schedule 2, the parties may in their constitution provide for the establishment of a co-ordinating workplace forum dealing with general matters concerning more than one workplace as well as subsidiary workplace-forums in each of the workplaces with jurisdiction over matters affecting only employees in this workplace.

Procedurally, in order to establish a workplace forum, a representative trade union (or two or more unions acting jointly) must apply to the CCMA using the prescribed form<sup>66</sup> and prove to the CCMA that a copy of the application has also been served on the employer.<sup>67</sup> The role of the CCMA is limited to considering the application and verifying that the application requirements are met. If the CCMA is satisfied that they are met, it must appoint a commissioner to assist the parties in establishing a workplace forum.<sup>68</sup>

It is important to note that in workplaces with fewer than 100 employees or where there is no majority union present, the employer and a minority union are free to voluntarily establish a

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<sup>63</sup> Steadman op cit (n3) 1172.

<sup>64</sup> Section 80(2) of the LRA.

<sup>65</sup> Section 78(b) of the LRA.

<sup>66</sup> See LRA form 5.1.

<sup>67</sup> Section 80(2), (3) of the LRA.

<sup>68</sup> Section 80(6) of the LRA.

participatory structure by way of a collective agreement.<sup>69</sup> The difference is that the union does not have legal power to compel the establishment of such a structure.<sup>70</sup> Therefore, minority unions are basically left with three options: They can increase their membership to become the majority union, they may form joint-ventures for the purposes of gaining a majority and they can agree with the employer on establishing a non-statutory structure.<sup>71</sup>

## **b) Process of establishing a workplace forum**

The LRA provides for four alternative models of establishing a workplace forum. Firstly, the forum can be established by way of collective agreement entered into between the employer and the representative trade union.<sup>72</sup> The LRA does not prescribe the content of such an agreement and therefore leaves it to the determination of the parties. A collective agreement is binding on the parties in terms of section 23 of the LRA and enforceable by means of arbitration.<sup>73</sup> If this option is chosen, then the provisions of the LRA regarding workplace forums do not apply.<sup>74</sup> This option shows the legislator's preference for voluntary and individually negotiated agreements rather than statutory regulation, as this caters for specific needs in an establishment.<sup>75</sup> Particularly, it permits the creation of workplace forums consisting exclusively of shop stewards which is preferred by many trade unions, fearing that they will be undermined by the creation of workplace forums.<sup>76</sup>

Secondly, if no collective agreement is concluded between the parties, the commissioner must meet the parties in order to facilitate agreement between them on the provisions of a constitution of the workplace forum.<sup>77</sup> The constitution must deal with the obligatory matters laid down by section 82(1) of the LRA and may deal with the optional matters in section 82(2) of the LRA, taking into account the guidelines in Schedule 2 of the LRA.

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<sup>69</sup> See below p 27.

<sup>70</sup> D Du Toit et al *Labour Relations Law- A comprehensive Guide* 401.

<sup>71</sup> R Van der Walt 'Have workplace forums contributed to worker participation? Some management perceptions' *S.Afr.J.Bus.Manage.* 2008, 39(2) 45, 47.

<sup>72</sup> Section 80(7), (8) of the LRA.

<sup>73</sup> Section 24 of the LRA.

<sup>74</sup> Section 80(8) of the LRA.

<sup>75</sup> See also Item 1(2) of Schedule 2 to the LRA.

<sup>76</sup> Du Toit op cit (n70) 394.

<sup>77</sup> Section 80(9) of the LRA.

Thirdly, the commissioner can constitute a workplace forum and determine the provisions of the constitution, thereby using the guidelines of Schedule 2 of the LRA ‘in a manner that best suits the particular workplace involved’.<sup>78</sup> The commissioner is required to determine only those provisions the parties cannot agree on.<sup>79</sup>

Lastly, section 81 of the LRA makes special provision for a trade union based workplace forum. A representative trade union that is recognised in terms of a collective agreement by the employer for the purposes of collective bargaining in respect of all employees in the workplace may apply to the CCMA for the establishment of a workplace forum.<sup>80</sup> In this case, all the provisions set out in Chapter 5 of the LRA will apply except those dealing with the election process.<sup>81</sup> Instead, the representative trade union may choose the members of the forum from among its elected representatives in the workplace.<sup>82</sup> This could potentially lead to a conflict of interest as the shop stewards as members of the workplace forum would need to promote efficiency in the workplace<sup>83</sup> while at the same time representing the interests of the trade union members.<sup>84</sup>

The members of the workplace forum are directly elected by all employees in the workplace and the right to vote is not restricted to trade union members.<sup>85</sup> Likewise, section 79(a) of the LRA charges the workplace forum with representing the entire workforce. The constitution must include a formula for determining the number of seats in the forum<sup>86</sup> as well as for the distribution of those so as to reflect the occupational structures of the workplace.<sup>87</sup> This is aimed at ensuring that non-unionised workers are given a voice on the forum. However, as employees not subject to collective agreements might try to air their grievances of collective bargaining issues such as pay, this provision may lead to demarcation issues. On the other hand, the forum can be used to enhance communication between different sections of the workforce who may

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<sup>78</sup> Item 1(2) of Schedule 2 to the LRA.

<sup>79</sup> Section 80(10) of the LRA.

<sup>80</sup> Section 81(1) of the LRA.

<sup>81</sup> Section 80(3) of the LRA.

<sup>82</sup> Section 81(2) of the LRA.

<sup>83</sup> Section 79(b) of the LRA.

<sup>84</sup> Du Toit op cit (n70) 400.

<sup>85</sup> Section 82(1)(c) of the LRA.

<sup>86</sup> Section 82(1)(a) of the LRA.

<sup>87</sup> Section 82(1)(b) of the LRA.

otherwise be hostile to each other.<sup>88</sup> The constitution must further provide for the appointment of an employee as election officer.<sup>89</sup>

### **c) Functions and powers of the workplace forum**

The general functions of the workplace forum are set out in section 79 of the LRA as follows:

- (i) to promote the interests of all employees (whether trade union members or not)
- (ii) to enhance efficiency in the workplace
- (iii) to be consulted by the employer, with a view to reaching consensus, about the matters listed in section 84
- (iv) to participate in joint decision making about the matters referred to in section 86.

The LRA provides for three forms of participation rights in order to achieve these goals, being the right to disclosure of information,<sup>90</sup> consultation<sup>91</sup> and joint decision-making.<sup>92</sup> It is important to note that the LRA does not provide for a right of workplace forums to initiate consultation or joint decision-making. Therefore, a workplace forum generally can only act reactively with one exception: Pursuant to section 87, a newly established forum may request a meeting with the employer to review merit criteria and discretionary bonuses, disciplinary codes and procedures, and non-work performance related conduct.<sup>93</sup> The following briefly describes the workplace forum's participation rights.

#### **aa) Disclosure of information**

Pursuant to section 89 (1) of the LRA, an employer is obliged to disclose to its workplace forum all relevant information that will allow the workplace forum to engage effectively in consultation<sup>94</sup> and joint decision-making.<sup>95</sup> However, section 89(2) of the LRA provides for

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<sup>88</sup> G Wood and P Mahabir 'South Africa's Workplace Forum system: A stillborn experiment in the democratisation of work?' *Industrial Relations Journal* (2001) 32:3 230, 234.

<sup>89</sup> Section 82(1)(d) of the LRA.

<sup>90</sup> Section 98 of the LRA.

<sup>91</sup> Sections 84, 85 of the LRA.

<sup>92</sup> Section 86 of the LRA.

<sup>93</sup> See also M Olivier 'Workplace Forums: Critical Questions from a Labour Law Perspective' (1996) 17 ILJ 803, 805 Manamela op cit (n9) 732.

<sup>94</sup> See below p 23.

<sup>95</sup> See below p 25.

limits to this duty that are identical to those in the context of collective bargaining<sup>96</sup>, for example if the information is legally privileged or confidential. The employer must inform the forum in writing if and what kind of information is confidential.<sup>97</sup> A dispute regarding the disclosure of information can be referred to the CCMA by either party.<sup>98</sup> If the dispute remains unresolved after conciliation, any party may request for it to be resolved through arbitration.<sup>99</sup>

In any dispute, the commissioner has the power to decide whether or not the requested information is relevant.<sup>100</sup> If he or she decides that the information is relevant and if it is confidential or private personal information relating to an employee, the commissioner is required to ‘balance the harm that the disclosure is likely to cause to an employee or employer against the harm that the failure to disclose the information is likely to cause to the ability of the workplace forum to engage effectively in consultation and joint decision-making’.<sup>101</sup> Section 91 of the LRA provides that if the commissioner finds in a dispute about an alleged breach of confidentiality that such breach has occurred, the commissioner may order the withdrawal of the right to the disclosure of information for a period specified in the arbitration award. This section therefore penalises the misuse of confidential information *ex post facto*.<sup>102</sup>

In addition, the workplace forum may request to inspect any documented information that is required to be disclosed by the employer and the employer is required to provide copies.<sup>103</sup> If there is a dispute about an alleged breach of confidentiality, the commissioner may in its arbitration award order to withdraw the right to disclosure of information for a certain period.<sup>104</sup>

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<sup>96</sup> See section 16 of the LRA.

<sup>97</sup> Section 89(2A) of the LRA.

<sup>98</sup> Section 89(3) of the LRA. The procedure that has to be followed by the CCMA is laid down in section 89(4)-(10) of the LRA and is identical with the procedure in section 16(6)-(13) of the LRA.

<sup>99</sup> Section 89(6) of the LRA.

<sup>100</sup> Section 89(7) of the LRA.

<sup>101</sup> Section 89(8) of the LRA.

<sup>102</sup> MM Botha ‘In Search of Alternatives or Enhancements to Collective Bargaining in South Africa: Are Workplace Forums a viable option?’ PER/PELJ 2015(18)5 1826.

<sup>103</sup> Section 90 of the LRA.

<sup>104</sup> Section 91 of the LRA.

## **bb) Consultation**

Section 85(1) of the LRA requires the employer to consult the workplace forums and attempt to reach consensus with it before implementing a proposal on any of the following topics:<sup>105</sup>

- (a) restructuring of the workplace, including the introduction of new technology and new work methods
- (b) changes in the organisation of work
- (c) plant closures
- (d) mergers and transfers of ownership in so far as they have an impact on the employees
- (e) dismissal of employees for reasons based on operational requirements
- (f) exemptions from any collective agreement or any law
- (g) job grading
- (h) criteria for merit increases or the payment of discretionary bonuses
- (i) education and training
- (j) product development plans
- (k) export promotion.

Additionally, the employer must consult the forum on any matter that may affect employees in the workplace arising from the report on the employer's financial and employment situation, its previous and anticipated future performance in the short term and long term which the employer is obliged to present at each of its meetings with the forum.<sup>106</sup>

There are three ways in which this list can be extended: A bargaining council may add matters in workplaces that fall within its registered scope.<sup>107</sup> The representative trade union may also conclude a collective agreement with the employer adding additional matters<sup>108</sup> and any other law may confer on the workplace forum the right to be consulted about additional matters.<sup>109</sup> Further, an agreement can be reached between the representative trade union and the employer in terms of which the workplace forum may exercise health and safety functions.<sup>110</sup>

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<sup>105</sup> Section 84(1) of the LRA.

<sup>106</sup> Section 83(2)(b) of the LRA.

<sup>107</sup> Section 84(2) of the LRA.

<sup>108</sup> Section 84(3) of the LRA.

<sup>109</sup> Section 84(4) of the LRA.

<sup>110</sup> Section 85(5) of the LRA.



The process of consultation is described as follows: First, the employer is required to disclose to the workplace forum, subject to the limitations in section 89 of the LRA, all relevant information that will enable it to engage effectively in consultation.<sup>111</sup> The employer must then allow the workplace forum an opportunity to make representations and to advance alternative proposals.<sup>112</sup> The employer must consider those and respond to them, if the employer does not agree with them, stating the reasons for disagreeing.<sup>113</sup>

Section 85 of the LRA requires the employer to do more than notify the forum of any proposal and in good faith to consider any suggestions it may make. The process must involve serious discussion between both parties on a collective basis. Steadman suggests that consultation means ‘negotiation’ as the employer is required to reach consensus with the forum which is akin to the meaning of good faith bargaining.<sup>114</sup> This constitutes an extensive inroad into managements’ prerogative and departs from international consultation requirements in terms of which the employer, after hearing the forum, has the right for final decision.<sup>115</sup> Also, it is suggested that this could lead to a prolonged consultation process and force the employer into various proceedings before being able to implement a decision.<sup>116</sup>

If the parties are unable to reach consensus after the consultation process the employer must invoke any agreed procedure to resolve any differences before implementing the proposal.<sup>117</sup> This has the effect that, in principle, it remains possible to embark upon industrial action, unless the agreed dispute resolution procedure provides otherwise.<sup>118</sup> Strike action is only possible though in respect of the employer’s proposal itself and not in respect of any alleged procedural defects in the consultation process (which must be referred to arbitration in terms of section 94 of the LRA).<sup>119</sup> Alternatively, the employer may withdraw the proposal or unilaterally implement it, and then possibly face a normal dispute that could result in industrial action.<sup>120</sup>

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<sup>111</sup> Section 89(1) of the LRA, see above p 21.

<sup>112</sup> Section 85(2) of the LRA.

<sup>113</sup> Section 85(3) of the LRA.

<sup>114</sup> Steadman op cit (n3) 1174; J Grogan *Workplace Law* (2014) 333; Botha op cit (n102) 1824.

<sup>115</sup> Botha op cit (n102) 1822.

<sup>116</sup> Steadman op cit (n3) 1174.

<sup>117</sup> Section 85(4) of the LRA.

<sup>118</sup> Botha op cit (n102) 1822.

<sup>119</sup> Botha op cit (n102) 1837.

<sup>120</sup> Steadman op cit (n3) 1174.

The right to initiate the consultation process by submitting proposals is restricted to employers, the workplace forum is not given the right to raise new issues. This departure from international law was intended to appease employers' concerns about interference with their management prerogative.<sup>121</sup>

### **cc) Joint decision-making**

Joint-decision making in terms of section 86 of the LRA requires the employer to consult and reach consensus with a workplace forum before implementing any proposal in respect of any matters agreed to in a collective agreement or, in the absence of a collective agreement, in respect of any matters listed in section 86 (1) (a)-(d) of the LRA.

Joint decision-making limits the employer's managerial prerogative and breaks with unilateral and hierarchical decision-making in the workplace as employees can prevent the employer from deciding on a particular issue unless the consent of the workplace forum has been obtained.<sup>122</sup> In South Africa - in contrast to many European countries<sup>123</sup> - the list of matters for joint decision-making in section 86 (2) of the LRA is limited to the following four subjects: (a) disciplinary codes and procedures, (b) rules relating to the proper regulation of the workplace applying to the conduct, (c) measures designed to protect and advance persons disadvantaged by unfair discrimination, particularly affirmative action programmes,<sup>124</sup> and (d) changes to the rules of employer-controlled social benefit schemes. The employer and the representative trade union can conclude a collective agreement adding additional matters or removing any of the matters listed in section 86(1) of the LRA.<sup>125</sup> Any other law may also confer the right to participate in joint decision-making about additional matters.<sup>126</sup>

The consensus reached between the workplace forum and the employer in itself has no legal status and is not legally binding on the parties. It can only have legal effect to the extent that it is incorporated in a binding workplace rule, contracts of employment or a subsequent collective agreement.

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<sup>121</sup> Du Toit op cit (n70) 404.

<sup>122</sup> Satgar op cit (n13) 45; Botha op cit (n102) 1824.

<sup>123</sup> See for example the list comprising 13 matters in section 87(1) of the German WCA.

<sup>124</sup> Du Toit op cit (n70) 407.

<sup>125</sup> Section 86(2) of the LRA.

<sup>126</sup> Section 86(3) of the LRA.

If the parties are unable to reach agreement on a matter of joint decision-making, the employer may withdraw the proposal or refer it to arbitration in terms of a procedure agreed on in terms of section 80(2) of the LRA or to the CCMA as a dispute for conciliation if there is no agreed procedure.<sup>127</sup> The employer must satisfy the Commission that a copy of the referral has been served on the chairperson of the workplace forum<sup>128</sup> and the CCMA must attempt to resolve the dispute through conciliation.<sup>129</sup> If it remains unresolved, the employer may request that the dispute be resolved through arbitration.<sup>130</sup> The employer may not unilaterally implement a proposal, and there is no right to strike over issues for joint decision making.<sup>131</sup>

#### **d) Constitution of the workplace forum**

Pursuant to section 82(1)(r) of the LRA, the constitution must require the employer to provide, at its cost, adequate facilities to the workplace forum in order to perform its functions. This includes fees, facilities and materials necessary for the election process<sup>132</sup> as well as administrative and secretarial facilities (including, but not limited to a room with access to a telephone) that are necessary for the workplace forum's fulfilment of its duties.<sup>133</sup> The costs incurred must be reasonable, having regard to the size and capabilities of the employer.<sup>134</sup>

The constitution of the workplace forum must further include provisions governing time off with pay during working hours in order to perform the functions and duties of a member of a workplace forum and in order to undergo relevant training.<sup>135</sup> The time off must be reasonable, so as to prevent the undue disruption of work.<sup>136</sup> The costs incurred by training measures must be paid by the employer provided that they are reasonable in regard to the size and capabilities of the employer.<sup>137</sup> If a workplace consists of more than 1,000 employees, the constitution must provide for the designation of full-time workplace forum members.

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<sup>127</sup> Section 86(4)–(7) of the LRA.

<sup>128</sup> Section 86(5) of the LRA.

<sup>129</sup> Section 86(6) of the LRA.

<sup>130</sup> Section 86(6) of the LRA.

<sup>131</sup> Sections 65 (1)(c), 86(7); see also Explanatory Memorandum op cit (n1) 314; Steadman op cit (n3) 1174.

<sup>132</sup> Schedule 2 item 8(a).

<sup>133</sup> Schedule 2 item 8(b).

<sup>134</sup> Schedule 2 item 8(c).

<sup>135</sup> Section 82(1)(p) of the LRA.

<sup>136</sup> Schedule 2 item 7(b).

<sup>137</sup> Schedule 2 item 7(c).

The constitution of the workplace forum must also provide that the workplace forum may ask experts to assist it in the performance of its functions and to attend any meeting of the workplace forum, including such with the employer or employees. An expert is entitled to any information to which the workplace forum is entitled to and may inspect and copy any document the workplace forum is entitled to inspect.<sup>138</sup> The Act does not explicitly determine who should pay the costs of inviting an expert. However, since the workplace forum does not have own means it is likely that the employer will have to pay for the costs if they are reasonable, having regard to its size and capabilities.<sup>139</sup>

#### **e) Non-statutory structures**

Apart from statutory workplace forums, non-statutory worker participation structures existed in South Africa prior to the new LRA and still continue to be established. In workplaces with fewer than 100 employees or where there is no representative union but also in any other workplace, the employer and a union are free to establish a participatory structure with all or only some of the functions determined in Chapter 5. Such an agreement is binding on the parties and enforceable in terms of section 23 of the LRA. Non-statutory structures permit the most flexible arrangements and can be tailored entirely to the specific workplace and the parties' needs and wishes.<sup>140</sup> Research shows that non-statutory employee representation structures have proliferated, mostly driven by management.<sup>141</sup> Steadman even suggests that the statutory provisions have provided an impetus for employers and trade unions to establish non-statutory structures.<sup>142</sup>

The most important difference is that such a structure can only be established in agreement with the employer. Further, the structures differ from the statutory structures: In most cases, both management and employee representatives are party to the forum. The structure is mostly described in a constitution, not necessarily in the form of a collective agreement in terms of the Act. In a study conducted at Rand Water Participation, Co-operation and Partnership conducted by Opperman and Steadman, shop stewards as well as managers reported that employee participation structures have reduced conflict and the adversarial nature of communication between management and the employees. Moreover, the decision-making process has become

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<sup>138</sup> Section 82(1)(t) of the LRA, Schedule 2 item 9.

<sup>139</sup> See Schedule 2 item 8(c).

<sup>140</sup> Du Toit op cit (n70) 401.

<sup>141</sup> Du Toit op cit (n70) 53.

<sup>142</sup> Steadman op cit (n3) 1191.

more efficient and effective leading to a more democratic, equitable and empowering work environment.<sup>143</sup> According to their studies, difficulties arise when employee participation systems are not effectively managed and monitored: Decision making may take longer, may absorb greater resources and therefore cause costs.<sup>144</sup>

#### **4. Relationship between trade unions and workplace forums**

South African trade unions have historically been hostile to forms of worker consultation which they believed may 'result in co-option' by management and the 'blunting of class struggle'.<sup>145</sup> In response to this, the LRA subordinates workplace forums to the collective bargaining process so that a workplace forum is essentially a trade union rather than an employee-controlled system of participation even though it represents all employees in a workplace.<sup>146</sup>

##### **a) Statutory framework favouring trade unions**

The following serves as an overview of the statutory rights of trade unions (most of which are exclusively granted to representative trade unions) in relation to workplace forums:

- a) Only a representative trade union may apply to the Commission for the establishment of a workplace forum.<sup>147</sup>
- b) The primary option of establishing a workplace forum is one created by collective agreement between the employer, the representative trade union and any registered trade union that has members employed in the workplace.<sup>148</sup> If the workplace forum is established by collective agreement, the provisions of the LRA do not apply.<sup>149</sup>
- c) The LRA provides for a trade union based workplace forum if the representative trade union is recognised in terms of a collective agreement by an employer for the purposes of collective bargaining in respect of all employees in the workplace. Such trade union may then choose the members of the workplace forum from among its elected representatives, shop stewards, in the workplace.<sup>150</sup>

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<sup>143</sup> Steadman op cit (n3) 1187.

<sup>144</sup> Steadman op cit (n3) 1188.

<sup>145</sup> B Hepple 'Negotiating social change in the shadow of the law' 2012 SALJ 248, 265.

<sup>146</sup> Manamela op cit (n9) 114.

<sup>147</sup> Section 80(2) of the LRA.

<sup>148</sup> Section 80(7) of the LRA.

<sup>149</sup> Section 80(8) of the LRA.

<sup>150</sup> Section 81 of the LRA.

- d) If another registered trade union becomes representative, it may demand a new election at any time within 21 months after each preceding election.<sup>151</sup>
- e) Any registered trade union with members at the workplace may nominate candidates for election to the workplace forum.<sup>152</sup>
- f) Office-bearers or officials of the representative trade union may attend meetings of the workplace forum, including meetings with the employer or the employees.<sup>153</sup>
- g) The representative trade union and the employer may, by agreement, change the constitution of the workplace forum.<sup>154</sup>
- h) If any of the statutory matters for consultation or joint decision-making are regulated by a collective agreement with the representative trade union, they are excluded from the agenda of the workplace forum.<sup>155</sup>
- i) The representative trade union and the employer may by collective agreement add matters to the agenda of joint decision making and consultation<sup>156</sup> and may remove all or any of the statutory topics for joint decision-making.<sup>157</sup>
- j) A representative trade union may request a ballot to dissolve a workplace forum. If more than 50 per cent of the employees who have voted in the ballot support the dissolution of the workplace forum, it must be dissolved.<sup>158</sup>

#### **b) Demarcation of issues for collective bargaining**

The LRA does not provide for a clear demarcation of issues subject to collective bargaining and issues that should be dealt with by workplace forums. Collective bargaining generally takes place to ‘determine wages, terms and conditions of employment and other matters of mutual interest’.<sup>159</sup> The courts have interpreted the term ‘matter of mutual interests’ broadly so as to include issues beyond those that directly concern the employment relationship, such as wages, and includes issues that are generally of significance or of interest to the parties.<sup>160</sup> This includes

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<sup>151</sup> Section 82(1)(f) of the LRA.

<sup>152</sup> Section 82(1)(h) of the LRA, Schedule 2 item 4(2)(b).

<sup>153</sup> Section 82(1)(u) of the LRA.

<sup>154</sup> Section 80(1)(v) of the LRA.

<sup>155</sup> Sections 84(1), 86(1) of the LRA.

<sup>156</sup> Sections 84(3), 86(2)(a) of the LRA.

<sup>157</sup> Section 86(2)(b) of the LRA.

<sup>158</sup> Section 93 of the LRA.

<sup>159</sup> Section 1(c)(i) of the LRA.

<sup>160</sup> A Van Niekerk and N Smit *Law@work* (2016) 400.

production related matters, such as restructuring, so that in fact trade unions partially have to relinquish their issues for collective bargaining and place them on workplace forum. However, the scope of the right to bargain collectively is limited upon the so-called ‘core areas’ of the employer’s managerial prerogative such as determining the direction, plans and policies of the business. Key strategic and operational decisions relating to the running of the business are therefore left to management or to consultation/joint decision-making with the workplace forum.<sup>161</sup> However, in *Pikitup (Soc)Ltd v SAMWU*,<sup>162</sup> the issue in dispute was the employer’s decision to breathalyse its drivers and to institute a biometric time and attendance system. The court held that merely because the breathalyser test fell within the scope of ‘managerial prerogative’, this does not automatically mean that it is excluded from the class of matters of mutual interest.

Since the issues are not clearly separated, unions fear that if they initiate the establishment of workplace forums, they will lose power and influence in the workplace. Sections 84(1) and 86(1) of the LRA safeguard unions and provide for a prerogative of representative trade unions to decide on the matters for consultation and joint decision-making. This makes workplace forums dependent upon unions to be effective which can create a platform of competition between both bodies.

### **c) Trade unions’ perception towards workplace forums**

The introduction of workplace forums can in theory have practical benefits for trade unions. One of the reasons for the introduction of workplace forums was that collective bargaining was often confined to matters such as wages and working conditions as shop stewards may not have the resources and skills to introduce their own ideas in matters such as technology, productivity and the reorganisation of work.<sup>163</sup> However, through the extensive list of statutory matters for consultation in section 84(1) of the LRA, substantial employee involvement and workplace democratisation may be encouraged and unions strengthened. Further, unions are given the opportunity through the workplace forums to recruit members, especially more skilled and white-collar employees. Baskin notes that workplace forums could also encourage inter-union

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<sup>161</sup> Davis, Le Roux op cit (n2) 316; Botha op cit (n102) 1816.

<sup>162</sup> [2014] 3 BLLR 217 (LAC).

<sup>163</sup> P Benjamin and C Cooper ‘Innovation and Continuity: Responding to the Labour Relations Bill’ (1995) 16 ILJ 258, 267.

cooperation at the workplace even while union rivalry continues at sectoral level.<sup>164</sup> Further, the employer is obliged to disclose all relevant information in respect of matters of consultation and joint decision-making<sup>165</sup> (except for issues subject to the limitations in section 89(2) of the LRA) which can also benefit the unions.<sup>166</sup>

Research conducted by Van Zyl in 1997 within fourteen trade unions showed that trade unions saw possible benefits in establishing workplace forums such as the promotion of workplace democracy, the enhancement of participation and co-operation, increased worker participation especially in workplaces where literacy levels of workers are high and the disclosure of information would therefore benefit workplace forums and unions. On the other hand, trade unions were concerned that in sectors with low skilled workers and a low literacy rate would not be able to deal with the complex issues workplace forums are supposed to deal with and therefore would need special training. Further, unions feared that workplace forums may undermine and weaken unions and replace the existing shop steward structure.<sup>167</sup> They also feared that management may influence them as unions do not have sufficient control over the forums. According to studies conducted by Wood and Mahabir in two workplace forums in 1998, trade unions argued that if they leave matters to the workplace forum, the employer is given too much power as section 84 of the LRA does not require the parties to conclude an agreement and an attempt to reach consensus by the employer is sufficient.<sup>168</sup> Also, it was argued that union officials lack the time and resources to deal with workplace forum issues, attend the meetings and provide expert advice. Trade unions feared a decline in their membership as the employees' representation through the workplace forum does not depend on trade union membership.<sup>169</sup> Since the establishment of a workplace forum requires an application of the representative trade union to the CCMA, the prevailing opposition and mistrust of trade unions towards the forums is one of the main reasons why there are so few forums established in South Africa.

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<sup>164</sup> J Baskin and V Satgar 'South Africa's New LRA- A critical Assessment and Challenges for Labour Law' (1995) 19(5) SA Labour Bulletin 50.

<sup>165</sup> Section 89 of the LRA.

<sup>166</sup> See *Atlantis Diesel Engines (Pty) Ltd v National Union of Metalworkers of South Africa* (1994) 15 ILJ 1247; Manamela op cit (n9) 733.

<sup>167</sup> Botha op cit (n102) 1829.

<sup>168</sup> Botha op cit (n102) 1830.

<sup>169</sup> K Von Holdt 'Workplace Forums Undermining Unions?' (1995) 19 SA Labour Bulletin 59, 61.



#### **d) Criticism of the statutory model**

The relationship between trade unions and workplace forums as regulated in the LRA has been subject to criticism.

Some believe that the demarcation in the LRA between trade unions and workplace forums does not go far enough and that the LRA provides unions with too much power over workplace forums. As their establishment and dissolution as well as the range of topics that are subject to consultation and joint decision-making depends on the trade unions' wishes, forums are constrained to acting as an extension of trade unions rather than a genuine employee participation structure.<sup>170</sup> This could lead to a situation like in the U.S. where bargaining is predominantly at plant level and adversarial attitudes of the bargaining table carry over to daily plant relationships.<sup>171</sup> Making workplace forums overly dependent on collective bargaining creates a platform of competition between both worker representation structures.<sup>172</sup> The danger is that the workplace forum becomes 'yet another bargaining forum whose proceedings are characterised by aggressive distributive bargaining across an adversarial divide in the plant itself.'<sup>173</sup>

Von Holdt has argued that because of the adversarial industrial relations in South Africa it is not possible to create two separate institutions charged with representing the employees' interests without creating conflict.<sup>174</sup> Whilst in Germany, there is a clear separation between adversarial bargaining at sectoral level and codetermination at workplace level,<sup>175</sup> in South Africa industrial relations are less centralised and workplace forums have to coexist with formalised plant level bargaining which inevitably allows room for demarcation disputes.<sup>176</sup> Many smaller unions prefer to operate on a plant level basis because this is the only level where they can have a significant impact. Similarly, employers prefer plant level bargaining, as it is more flexible and allows for agreements more aligned with the circumstances of the specific plant.<sup>177</sup> Having two

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<sup>170</sup> Manamela op cit (n9) 733.

<sup>171</sup> C Summers 'Workplace Forums from a Comparative Perspective' (1995) 16 ILJ 806, 808.

<sup>172</sup> Manamela op cit (n9) 733.

<sup>173</sup> M Brassey M and J Brand 'Flaws and Fantasies: A Conceptual Analysis of the Bill' March 1995 11(4) Employment Law 79.

<sup>174</sup> K Von Holdt 'Workplace Forums: Can They Tame Management?' March 1995 19(1) SA Labour Bulletin 32; Von Holdt op cit (n169) 61.

<sup>175</sup> See below p 49.

<sup>176</sup> Wood and Mahabir op cit (n88) 232.

<sup>177</sup> Olivier op cit (n92) 812.

different institutions representing employee interests at workplace level can give rise to competition and conflict.<sup>178</sup> Von Holdt therefore sees the trade union based workplace forum in terms of section 81 of the LRA as the only workable type which in effect means giving the shop stewards committees the right of consultation and joint decision-making as regulated in Chapter 5 of the LRA. This would, however, not be in line with the objective of the LRA to facilitate a shift at the workplace from adversarial collective bargaining to joint problem-solving and cooperation.<sup>179</sup> Others fear that the workplace forums will prove to be more effective than trade unions in representing the employees' interests which could lead to workers transferring their loyalty to workplace forum, thereby further weakening the position of trade unions.<sup>180</sup>

Von Holdt criticises the division between distributive and cooperative issues introduced by the LRA. He questions the assumption that collective bargaining relations are conflictual, whereas production and human resource issues are not and can therefore be dealt with cooperatively. Productivity issues such as training, health and safety, production targets and staffing levels impact on cost and benefit and can similarly lead to conflict. Von Hold suggests that workers can only influence the employer's decision-making through a combination of organisational strength and legal rights.<sup>181</sup>

## **5. Reasons for the failure of workplace forums**

The introduction of workplace forums in South Africa is based on the assumption that participatory structures increase productivity and thereby lead to success in international markets. It is asserted that employee participation improves the quality of workers' working life and provides a democratic workplace. Furthermore, employees will more likely be committed to the management decisions taken in this forum. An increased flow of information can enhance the efficiency of a corporation as management can gain access to the workers' knowledge of the production process and make informed decisions which can help to avoid mistakes. As Summers pointed out in his studies of workplace forums from a comparative perspective, 'workers have knowledge about the reality of production in their workplace, the cause of defective products, lost

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<sup>178</sup> Manamela op cit (n9) 735.

<sup>179</sup> Explanatory Memorandum op cit (n1) 311.

<sup>180</sup> D Du Toit 'Collective Bargaining and Worker Participation' (2000) 21 ILJ 1544, 1555.

<sup>181</sup> Von Holdt op cit (n169) 60.

time and work injuries, and the potential for involvement which management never learns'.<sup>182</sup> Further, the disclosure of information provisions can be beneficial for unions.<sup>183</sup>

A study conducted by Msweli-Mbanga and Potwana confirms that access to participation is positively associated with willingness to participate and that the more access employees have to participation, the less the resistance to change efforts within an organisation.<sup>184</sup> Greater responsibility is suggested to lead to greater interest and enhanced motivation and loyalty to the employer.

Despite all these potential benefits of workplace forums in theory, the introduction of statutory workplace forums in South Africa has not been successful. A number of reasons have been suggested for this. The Sociology of Work Unit at the University of Witwatersrand has monitored workplace forums since 1997 and makes the following observations:<sup>185</sup>

- Unions opposed the idea of workplace forums because they feared they would undermine the collective bargaining system.
- Employers opposed the idea of workplace forums, fearing their managerial prerogative would be undermined.
- Relationship between employers and employees in South Africa is still adversarial and not conducive to workplace forums.
- The prevailing economic climate of downsizing, mergers and relocations is not conducive to the establishment of workplace forums.
- Workers have limited capacity to participate meaningful and effectively in workplace forums.
- The small size of many corporations is an obstacle to the establishment of workplace forums.

The idea driving the Task Team that participation positively correlates with productivity, job security and power sharing levels has been criticised by the academic literature.<sup>186</sup> Klerck

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<sup>182</sup> Summers op cit (n171) 806.

<sup>183</sup> *Atlantis Diesel Engines (Pty) Ltd v National Union of Metalworkers of SA* (1994) 15 ILJ 1247.

<sup>184</sup> P Msweli-Mbanga and N Potwana. 'Modelling participation, resistance to change, and organisational citizenship behaviour: A South African case', *South African Journal of Business Management*, 37(1) 21.

<sup>185</sup> Steadman op cit (n3) 1182,1183.

<sup>186</sup> Klerck op cit (n7) 22.

assumes that the significance of workplace forums lies in the ability to remove obstacles to further productivity and economic growth rather than providing a direct contribution to the levels of output.<sup>187</sup> Furthermore, according to studies conducted by Wood and Mahabir in two workplace forums in 1998, even though the introduction of workplace forums has improved communication between workers and management, this did not result in a visible increase in productivity.<sup>188</sup> In one of the forums examined not one issue was discussed for consultation purposes and the majority union, after establishing the forum, had shown no further interest in it and focused on wage negotiations. Both employer and employee representatives stated that participation within the forum was time consuming and demanded commitment which neither party had shown.<sup>189</sup>

It was further criticised that, from a short-term perspective, participation absorbs greater resources such as more preparation time, paperwork, meetings and time off for training.<sup>190</sup> Moreover, the assumption underlying the LRA that productivity issues are cooperative whereas distributive issues are inherently adversarial is often contested. Klerck suggests that this assumption can easily be reverted by arguing that productivity issues go to the heart of the employers' managerial prerogative and are therefore more likely to provoke the employer's opposition than distributive issues.<sup>191</sup>

Another reason for the small number of forums established is the requirement that only representative trade unions can trigger the establishment of a forum only in workplaces with more than 100 employees. The threshold of 100 employees is aimed at assisting small and medium employers by relieving them from the duty to consult as the Task Team believed that larger workplaces are more likely to have the resources and skills required for the successful functioning of the workplace forum.<sup>192</sup> When the LRA was introduced in 1995, it was estimated that this requirement alone would limit the application of the provisions to only about 26 % of the workers in the formal sector.<sup>193</sup> The sectors that were excluded contributed 58 percent of the

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<sup>187</sup> Ibid.

<sup>188</sup> Wood and Mahabir op cit (n88) 239.

<sup>189</sup> Ibid.

<sup>190</sup> Steadman op cit (n3) 1189.

<sup>191</sup> See above p 11.

<sup>192</sup> D Du Toit 'Corporatism and Collective Bargaining in a Democratic South Africa' (1995) 16 ILJ 785, 804; Benjamin and Cooper op cit (n163) 267.

<sup>193</sup> Olivier op cit (n92) 810.

gross domestic product.<sup>194</sup> This high threshold not only excludes small businesses but also large companies in the retail sector for example<sup>195</sup> that employs thousands of workers but where individual workplaces have fewer than 100 employees. Further, as only majority unions within a workplace may apply for the establishment of a workplace forum,<sup>196</sup> workplaces in which no union (or more unions jointly) can boast majority support are also excluded. In 1995, when the LRA was introduced, 75 percent of the economically active population did not belong to unions.<sup>197</sup> Chapter 5 therefore does not apply to those establishments in which employees are in the most need of participation structures and this disadvantages unorganised workers as well as workers in small businesses, especially in sectors such as agriculture.<sup>198</sup> Bendix in her book concluded that the decision to assign the establishment of forums to majority unions was a political one pressured by trade unions rather than a rational one based on the effectiveness of union-initiated workplace forums.<sup>199</sup>

Moreover, as mentioned above,<sup>200</sup> trade unions see workplace forums as potential competitors which could be manipulated by management to undermine unions at plant level. They are concerned that forums will erode union power and collective bargaining structures especially as the LRA does not place a duty to bargain on the employer.<sup>201</sup> Majority unions argue that workplace forums will result in cooption and a division of workers and strengthen non-union and minority union interests.<sup>202</sup> Trade unions further argue that the works councils have insufficient countervailing power because they don't possess the strike weapon and because they are dependent on the employer.<sup>203</sup>

Not only trade unions but also management raise concerns. Employers claimed that the provisions in Chapter 5 introduced 'far-reaching new rights for employees going to the heart of business effectiveness and efficiency while there was no corresponding protection for employers

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<sup>194</sup> D Bosch, and D Du Toit 'Size does count' Mail & Guardian 24 February 1995, available at <https://mg.co.za/article/1995-02-24-size-does-count>, accessed on 15.07.2017.

<sup>195</sup> Benjamin and Cooper op cit (n163) 266.

<sup>196</sup> Section 80(2) of the LRA.

<sup>197</sup> Bosch and Du Toit op cit (n194).

<sup>198</sup> Bosch and Du Toit op cit (n194).

<sup>199</sup> S Bendix *Industrial Relations in South Africa* (1996) 565.

<sup>200</sup> See above p 30.

<sup>201</sup> Steadman op cit (n3) 1190.

<sup>202</sup> Steadman op cit (n3) 1191.

<sup>203</sup> Du Toit op cit (n180) 1557.

against the abuse and misuse of these rights by employees'.<sup>204</sup> Workplace forums are seen as an infringement of the employers' management prerogative, control, authority and power and management fears that the forum will meet union interests but that employer interests will not be met.<sup>205</sup> It is expected that workplace forums would delay decision-making, have many direct as well as indirect costs such as those in time and money of establishing and maintaining workplace forums.<sup>206</sup> The effect of democratisation of the workplace on organisational efficiency, responsiveness and flexibility is unpredictable. They further claim that the principle of voluntarism had been ignored as entry into the workplace forums system is compulsory for employers once a representative trade union has initiated the establishment of the forum.<sup>207</sup> Also, the confidentiality provisions do not provide enough protection against the disclosure of confidential information.<sup>208</sup> Management raises concerns about the employees' capability to understand the issues in dispute and the ability and capacity of unions to provide for the necessary support structure through the shop stewards representatives in the workplace.<sup>209</sup> Employers point out the difficulty of finding themselves in a situation where a third party, the CCMA arbitrator, decides issues relating to the constitution of the workplace forum or for joint decision making. Further, Weston and Lucio noted that even though statutory workplace employee-participation structures may improve and stabilise industrial relations, employers are often hostile to those structures as they are seen as too inflexible and may impede the company's adaption to the rapidly changing global environment.<sup>210</sup> This preference for non-statutory employee participation structures can also be seen in the South African context.<sup>211</sup> According to Buhlungu, however, the attempts to implement such voluntary structures are often 'tentative and half hearted'.<sup>212</sup>

Brand and Brassey further claim that Chapter 5 disadvantages management as the employer is not given the power in terms of the LRA to dissolve the forum once it has been

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<sup>204</sup> Steadman op cit (n3) 1175.

<sup>205</sup> Steadman op cit (n3) 1191.

<sup>206</sup> Steadman op cit (n3) 1184.

<sup>207</sup> J Brand and M Brassey 'Comments on the Draft Negotiation Document in Bill Form' (The New Labour Relations Act) (1995); Brassey and Brand op cit (n173).

<sup>208</sup> Steadman op cit (n3) 1175.

<sup>209</sup> Ibid.

<sup>210</sup> S Weston and MM Lucio 'In and beyond European works councils – Limits and possibilities for trade union influence' (1998) *Employee Relations* Vol. 20 No. 6 551.

<sup>211</sup> Du Toit op cit (n70) 53; Steadman op cit (n3) 1191.

<sup>212</sup> S Buhlungu 'A Question of Power: Co-Determination and Trade Union Capacity' (1999) *African Sociological Review* 3(1) 111.

established. Moreover, management can neither influence its establishment nor is it party to the forum. Whilst management has the duty to disclose information and to negotiate with the union, unions do not have disclosure duties.<sup>213</sup>

These concerns are often explained by the ‘fear of the unknown’. Both, trade unions and management in 1995 were unsure about how workplace forums would advance issues such as the democratisation of firms, the empowerment of workers, improving industrial relations and enhancing economic performance.<sup>214</sup> Today, it seems, these suspicions on both sides are still not overcome which can be ascribed to the small number of forums established in the past 22 years and thus to the lack of experience of both parties.

## **6. Proposed amendments in 2000**

In 2000, amendments to the LRA were proposed in the Labour Relations Amendment Bill to develop a more flexible approach and to make workplace forums less dependent on majority unions in an attempt to increase the popularity of workplace forums. One proposal was that in workplaces without a representative trade union, a registered trade union can apply to establish a workplace forum if the application is supported by non-union members and a majority of employees in the workplace as a whole support the application. Another proposal was to allow the majority of employees to apply to establish a workplace forum in a workplace in which there is no registered trade union.<sup>215</sup> Finally, it was proposed that a workplace forum can be established in a workplace of fewer than 100 employees.<sup>216</sup> These proposals were intended to enhance the opportunity for employees to establish workplace forums,<sup>217</sup> ultimately leading to more forums being established. It remains unclear why they were ultimately not accepted but it is speculated that they were objected to by both unions and employers: Unions feared that they would undermine their efforts to organise and employers feared over-regulation of small businesses and increasing power of workplace forums.<sup>218</sup> It was further brought forward that the amendment failed to address the following issues:

- The preference afforded to majority unions.

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<sup>213</sup> Brand and Brassey op cit (n207) 12.

<sup>214</sup> Steadman op cit (n3) 1176.

<sup>215</sup> Clause 17 of the Labour Relations Amendment Bill 2000.

<sup>216</sup> Clause 18(a) of the Labour Relations Amendment Bill 2000.

<sup>217</sup> Steadman op cit (n3) 1174.

<sup>218</sup> Botha op cit (n102) 1175.

- The enforceability and status of workplace agreements.
- The overlapping functions that existed between trade unions and workplace forums
- The lack of the right to initiate consultation and joint decision-making.<sup>219</sup>

## **7. Conclusion**

In conclusion, the introduction of workplace forums was doomed to failure from the outset due to a reluctance of both affected parties, trade unions and employers. The insignificance of the provisions in Chapter 5 can be seen in the very small number of forums established as well as in the fact that there still is not one court decision dealing with the provisions. A revision of chapter 5, therefore is long overdue. The question is whether the works council system in Germany can provide guidance in this regard.

## **III. WORKS COUNCIL SYSTEM IN GERMANY**

As mentioned, the introduction of workplace forums was inter alia drawn on the history of successful worker participation in Germany through works councils. This chapter therefore gives an overview of the works council system and analyses the relationship between works councils and trade unions in Germany.

### **1. History of employee participation**

In Germany, in the nineteenth century, a socialist trade union movement emerged, with the proclaimed aim to replace capitalism by socialism by way of revolution. Subsequently, in 1878, these trade unions were prohibited by law. However this had the opposite effect of trade unions developing undercover activities and led to an unintended strengthening of the movement so that their prohibition was abolished in 1890. One of the trade unions' goals was to create class consciousness among the workers and thus, collective agreements were considered to be 'pacts with the class enemy'. Still, in the 1870s employers and the socialist trade unions slowly started concluding collective agreements.

In 1848, in the so-called 'Parliament of the Paul's Church', a draft document on statutory bodies of workers' participation was elaborated not by trade unions but by scholars mostly. This

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<sup>219</sup> Botha op cit (n102) 1833.



document, however, did not have any immediate effect and the first workers' participation bodies were voluntarily introduced in some of the big companies since the early 1870s. Weiss ascribed this development to the following four reasons:<sup>220</sup>

First, employers tried to increase the legitimacy of rules of conduct in the workplace by integrating workers in determining such rules, thereby trying to eliminate conflicts. Further, company schemes of social assistance (before the Bismarck social security system was introduced in 1883) entailed a significant administrative effort which employers found profitable to transfer to the workers participation bodies without changing the power structure in the company. Thirdly, as the members of the representative bodies were chosen by the employer, they could easily be influenced and basically were 'in the hands' of the employers who used them as instruments of communication. Lastly, the reason for establishing such bodies was based on the employers' idea that it promoted the integration of the employees into the company and created a spirit of identification with the companies which the employers expected would keep employees away from the socialist trade unions.<sup>221</sup>

As one of the reasons for employers to introduce worker participation bodies was to minimise the emergence and influence of socialist trade unions, the trade unions strongly opposed statutory rules introduced in 1891 that provided for the introduction of representative bodies for workers in establishments of at least twenty employers. In terms of this legislation, representative bodies were elected by the workforce of the establishment and were not appointed by the employer and the workforce decided whether such bodies should exist in a workplace or not.<sup>222</sup>

During the so-called 'strategy debate'<sup>223</sup> the revolutionary strategy of the socialist trade union movement was replaced by another form of strategy that did not call into question the capitalist system as such but tried to restrict employers' powers legally by introducing employees involvement in management decision making. This led to the recognition of trade unions as legitimate representatives of the workforce by the employers' associations in a formal agreement signed in 1918. The parties agreed that collective bargaining should be the predominant

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<sup>220</sup> M Weiss 'Trade unions and institutionalised workers' participation: The German experience' (2005) 9 LDD 157, 159.

<sup>221</sup> Ibid.

<sup>222</sup> Ibid.

<sup>223</sup> Around the turn of the nineteenth to the twentieth century.

instrument of determining working conditions. From then on, trade unions tried to convert the works councils into their extended arm at the workplace. In 1919, as part of the Weimar Constitution, a statute was introduced that established bodies of employee representation called ‘works councils’ in all workplaces of at least twenty employees.<sup>224</sup> Upon request of the trade unions, section 8 was inserted which guaranteed that the introduction of works councils would not affect the unions’ activities – particularly collective bargaining. As trade unions today in South Africa still are, trade unions in Germany at that time were reluctant to cooperate with works councils and feared that they would be undermined and lose their influence in the workplace. However, they quickly saw the advantages of integrating works councils into their strategy and system and for example provided training for works council members. Further, trade unions fought for an amendment which was passed in 1928 in terms of which trade unions were allowed to submit lists of candidates for the election of works councils.<sup>225</sup> After the Second World War between 1933 and 1945, the cooperation between trade unions and works councils was strengthened and the Statute on Works Councils was passed in 1952 which provided for several instruments that gave trade unions legal power to influence the works council system. For example, trade unions were given access to the labour court if the election of works councils was not conducted according to the law and they were given the right to initiate elections by calling a workforce meeting to decide the question by way of majority vote. Further, provisions were made in terms of which trade unions could provide support to works councils by accessing the employer’s premises or by assisting in workplace meetings for example. Members of works councils were educated by trade unions. The Works Constitution Act of 1972 (“WCA”) (‘Betriebsverfassungsgesetz’) that is still regulating works councils today is based on this legislation from 1952.

It is evident from this overview that, despite initial mistrust and hostility of trade unions and employers towards statutory employee participation structures in the workplace, all parties adjusted to and benefit from, the system of worker representation. As Weiss pointed out, this was only possible due to the ‘jointly accepted understanding that collective bargaining and worker

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<sup>224</sup> Betriebsrätegesetz of 4 February 1920.

<sup>225</sup> Weiss op cit (n220) 162.

participation fulfil different functions, that the one cannot simply be substituted for the other, and that each has merits of its own.’<sup>226</sup>

## 2. The German legal framework

The following part briefly describes the statutory framework of works councils. As the WCA consist of 130 sections including several election regulations, only the most important differences to the South African system are presented in this dissertation.

### a) Establishment of works councils

Pursuant to section 1(1) of the WCA, every establishment that normally has five or more permanent employees older than 18 years, three of whom have been employed for at least six months can establish a works council. Contrary to the wording, according to which ‘works councils shall be elected [...]’, the law does not compel employers to establish a works council. The establishment of a works council is at the discretion of the employees of the establishment and they can compel the employer’s support.<sup>227</sup>

The WCA only applies to private companies, whereas the Federal Law on Staff Committees in the Public Sector (‘Bundespersönalvertretungsgesetz’) provides for the establishment of employee participation structures in the form of staff councils in public companies. In 2015, according to research studies conducted in around 16.000 establishments<sup>228</sup> by the ‘IAB-Betriebspanel’, 41% of the employees in the private sector have been represented by works councils, whereas the relative amount of employees in the public sector represented by staff councils amounts to 91%.<sup>229</sup> Furthermore, the research showed that the employer’s size plays a significant role: Whereas in establishments with 5-50 employees, 9% are represented by a works council, the percentage grows up to 89% in large companies.

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<sup>226</sup> Weiss op cit (n220) 166.

<sup>227</sup> R Richardi in Richardi, *Betriebsverfassungsgesetz* (2016) § 1 para 1; N Besgen in *Beck’scher Online-Kommentar Arbeitsrecht* (2017) § 1 BetrVG para 2; T Kloppenburg in Düwell, *Betriebsverfassungsgesetz* (2014) § 1 BetrVG para 1.

<sup>228</sup> [http://doku.iab.de/betriebspanel/2016/IAB-Betriebspanel\\_2016\\_d.pdf](http://doku.iab.de/betriebspanel/2016/IAB-Betriebspanel_2016_d.pdf), accessed on 6 May 2015.

<sup>229</sup> [https://www.destatis.de/DE/ZahlenFakten/GesamtwirtschaftUmwelt/Arbeitsmarkt/Doorpage/Indikatoren/QualitaetDerArbeit.html?cms\\_gtp=318944\\_slot%253D5](https://www.destatis.de/DE/ZahlenFakten/GesamtwirtschaftUmwelt/Arbeitsmarkt/Doorpage/Indikatoren/QualitaetDerArbeit.html?cms_gtp=318944_slot%253D5), accessed on 6 May 2017.

**Proportion of employees represented by a works council in relation to the amount of employees in total included in the research in 2015:<sup>230</sup>**

Size of the establishment	Employees with works council	
	Old West German states	Old East German states
5 to 50 employees	9	9
51 to 100 employees	35	36
101 to 199 employees	58	52
200 to 500 employees	74	69
More than 500 employees	89	87
Total	42	33

Source of data: IAB-Betriebspanel (2015)<sup>231</sup>

Works councils can be established in an ‘establishment’. The German Federal Labour Court has consistently defined an establishment as an organisational unit within which the employer solely or together with his employees continuously pursues specific purposes by means of material and immaterial resources.<sup>232</sup> Pursuant to section 1(1) of the WCA, works councils can also be elected in ‘joint establishments of several companies’. A joint company is assumed to exist if the companies employ the equipment and workers jointly in order to pursue their working objectives or if splitting the company would have the effect that one or several departments of an establishment would be allocated to another company that is involved in the split, without thereby fundamentally changing the organization of the establishment concerned.<sup>233</sup>

Like in South Africa, works councils represent all employees in the establishment; and an executive staff member does not constitute an ‘employee’ as defined in section 5 of the WCA.<sup>234</sup>

<sup>230</sup> [https://www.destatis.de/DE/ZahlenFakten/GesamtwirtschaftUmwelt/Arbeitsmarkt/Doorpage/Indikatoren/QualitaetDerArbeit.html?cms\\_gtp=318944\\_slot%253D5](https://www.destatis.de/DE/ZahlenFakten/GesamtwirtschaftUmwelt/Arbeitsmarkt/Doorpage/Indikatoren/QualitaetDerArbeit.html?cms_gtp=318944_slot%253D5), accessed on 6 May 2017.

<sup>231</sup> <http://www.iab.de/de/erhebungen/iab-betriebspanel.aspx/>, accessed on 6 May 2017.

<sup>232</sup> BAG 14.09.1988 – 7 ABR 10/87, NZA 1989, 190; BAG 17.01.2007 – 7 ABR 63/05, NZA 2007, 703 para 15; BAG 18.01.2012 – 7 ABR 72/10, NZA-RR 2013, 133 para 24.

<sup>233</sup> Section 1(2) of the WCA.

<sup>234</sup> Section 5(3) of the WCA.

Executive staff members have their own representation structure which is governed by the Regulation of the Committee of the Senior Executives (‘Sprecherausschussgesetz’).

The WCA provides for the establishment of additional bodies such as a central works council (‘Gesamtbetriebsrat’)<sup>235</sup>, a combined works council (‘Konzernbetriebsrat’)<sup>236</sup> and a youth and trainee delegation (‘Jugend- und Auszubildendenvertretung’).<sup>237</sup> However, these are not discussed further below.

## **b) Works council members**

Regular elections of works councils take place every four years<sup>238</sup> and the next regular election will be between 1 March and 31 May next year (2018) in all organisations. The Act provides for consistent regular works council elections in all establishments in order to facilitate the organisational preparation by trade unions.<sup>239</sup>

The number of works council members depends on the number of employees entitled to vote in the establishment.<sup>240</sup> As far as possible, the council should be composed of employees of various organisation units and different employment categories<sup>241</sup> and the gender that accounts for a minority of staff shall at least be represented according to its relative numerical strength whenever the works council consists of three or more members.<sup>242</sup>

Employees as well as every trade union represented in the establishment are entitled to submit lists of candidates,<sup>243</sup> whereby each list of candidates submitted by the employees has to be signed by at least onetwentieth of the employees entitled to vote, and at least by three employees with voting rights.<sup>244</sup> If more than three members of the works council are to be elected, the election is based on nomination lists which have to be submitted to the electoral board by eligible voters or trade unions.<sup>245</sup>

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<sup>235</sup> Sections 47-53 of the WCA.

<sup>236</sup> Sections 54-59a of the WCA.

<sup>237</sup> Sections 60-73b of the WCA.

<sup>238</sup> Section 13(1) of the WCA.

<sup>239</sup> BT Drucksache VI/1786, 37.

<sup>240</sup> Section 9 of the WCA.

<sup>241</sup> Section 15(1) of the WCA.

<sup>242</sup> Section 15(2) of the WCA.

<sup>243</sup> Section 14(3) of the WCA.

<sup>244</sup> Section 14(4) of the WCA.

<sup>245</sup> Sections 6 and 27 of the First Ordinance Implementing the Works Constitution Act (Election Regulations- WO).

### c) Powers of works councils

The WCA provides for the following different forms of employee participation that can be exercised by the works council:

- the right to be informed
- the right to be consulted
- the right of veto and
- the right to co-determination.

In the last two cases, the works council can block a decision by the employer as the employer is not entitled to take decisions without the prior approval of the works council.

Firstly, the works council has a right to timely information by the employer in order to fulfil its general duties as contemplated in terms of section 80(1) of the WCA.<sup>246</sup> In addition, the employer has to grant the works council access at any time to any documentation it may require to discharge its duties including the payroll showing the gross wages and salaries of the employees.<sup>247</sup>

The works council is also obliged to ensure that the employees in the establishment are treated in accordance with the principles of law and equity<sup>248</sup> and to see that effect is given to Acts, ordinances, safety regulations, collective agreements and works agreements to the benefit of the employees.<sup>249</sup>

Works councils are given the right to make proposals regarding measures benefiting the establishment and the staff such as a ban on smoking or health promotion.<sup>250</sup> In addition, the right to be heard by the employer prior to certain actions being taken is of particular importance. Pursuant to section 102(1) of the WCA, the works council has to be consulted before every dismissal and the reasons for the dismissal have to be disclosed. A notice of dismissal that is given to an employee without previously consulting the works council is null and void. The

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<sup>246</sup> Further rights to information are stipulated in section 90(1) of the WCA (regarding the construction of offices etc. and working procedures and operations), section 92(1) of the WCA regarding manpower planning and section 99(1) of the WCA regarding recruitment, grading, regrading and transfer.

<sup>247</sup> Section 80(2) of the WCA.

<sup>248</sup> Section 75(1) of the WCA.

<sup>249</sup> Section 80(1) Nr. 1 of the WCA.

<sup>250</sup> Section 80(1) Nr. 2 of the WCA.

works council can raise only certain objections against the dismissal as specified in section 102(3) of the WCA and has to do so in writing within a week giving its reason.<sup>251</sup> Even though the WCA does not provide for a right of the works council to ultimately prevent an employee from being dismissed, the consultation of the works council is a prerequisite for a valid dismissal. Similarly, in companies with more than twenty employees the employer has to notify the works council previous to any recruitment, grading, regrading and transfer.<sup>252</sup> The employer has to supply information on the person concerned and of the implication of the measure envisaged. The works council may only refuse its consent in certain cases expressly defined by section 99(2) of the WCA such as if the staff movement would constitute a breach of any Act, collective agreement or works agreement.<sup>253</sup> If the works council refuses to consent and one of the requirements of section 99(2) of the WCA is met, the employer may not carry out the measure and has to apply to the labour court for a decision in lieu in terms of section 99(4) of the WCA. These rights are referred to as ‘veto-rights’ of the works council.

Section 87 of the WCA, probably one of the most far-reaching rights of the works council, gives the works council the right to co-determination in a broad range of social matters such as rules of operation and the conduct of employees or the commencement and termination of the daily working hours as far as they are not prescribed by legislation or collective agreement. The employer cannot make a decision without the consent of the works council and if the parties are unable to reach an agreement, the conciliation committee makes a binding decision.<sup>254</sup>

Moreover, the works council has to be informed and consulted in establishments that normally have more than twenty employees with voting rights if the employer plans an alteration which may entail substantial prejudice to the staff or a large sector thereof.<sup>255</sup> The employer and the works council can then conclude a reconciliation of interest (‘Interessenausgleich’) in terms of section 112(1) of the WCA and an agreement on full or part compensation for any financial prejudice sustained by staff as a result of the proposed alterations (‘social compensation plan’, ‘Sozialplan’ in German). If the parties cannot agree on a social compensation plan, either side can request the conciliation committee to make a binding award which takes the place of an

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<sup>251</sup> Section 102(2) of the WCA.

<sup>252</sup> Section 99(1) of the WCA.

<sup>253</sup> Section 99(2) Nr. 1 of the WCA.

<sup>254</sup> See below p 48.

<sup>255</sup> Section 111 of the WCA.

agreement between the employer and the works council.<sup>256</sup> Therefore, in effect the works council is entitled to an enforceable right of co-determination.

#### **d) Works agreements**

In contrast to the South African system which does not regulate the status of agreements entered into between the workplace forum and the employer, the WCA provides that the parties can conclude legally binding works agreements ('Betriebsvereinbarungen'). Works agreements are mandatory for the parties of the agreements and binding on the employees to whom they apply.<sup>257</sup> Hence, they don't have to be incorporated in employment contracts or collective agreements in order to have effect. Pursuant to section 77(3) of the WCA, works agreements do not deal with remuneration and other conditions of employment that have been fixed or are normally fixed by collective agreement. This serves to protect the principle of the autonomy of collective bargaining enshrined in art 9(3) of the German Basic Law.<sup>258</sup> It prevents the works council from acting as a 'non-contributory trade union-replacement', thereby competing with trade unions, and makes it impossible for works councils to undercut working conditions stipulated under collective agreements.<sup>259</sup> As can be seen in this section, the WCA clearly separates the power of trade unions and works councils, guaranteeing the trade union's supremacy when it comes to the regulation of working conditions.<sup>260</sup> A collective agreement can, however, expressly authorise the making of supplementary works agreements by means of so-called 'opening clauses' ('Öffnungsklauseln') in union agreements.<sup>261</sup>

The responsibility for the execution of works agreements lies with the employer and the works council may not interfere.<sup>262</sup> Unless otherwise agreed between the parties, works agreements can be terminated by both parties at three months' notice.<sup>263</sup> However, in matters of co-determination, the provisions of the works agreements continue to apply even after its expiry until a fresh agreement is made.<sup>264</sup>

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<sup>256</sup> Section 112(4) of the WCA.

<sup>257</sup> Section 77(4) of the WCA.

<sup>258</sup> T Kania in *Erfurter Kommentar zum Arbeitsrecht* § 77 BetrVG para 43.

<sup>259</sup> P Hanau 'Die Entwicklung der Betriebsverfassung' NZA 1993 817, 821.

<sup>260</sup> See below p 49.

<sup>261</sup> Section 77(3) of the WCA.

<sup>262</sup> Section 77(1) of the WCA.

<sup>263</sup> Section 77(5) of the WCA.

<sup>264</sup> Section 77(6) of the WCA.



### e) **Dispute resolution**

Industrial action as a means of resolving disputes is expressly prohibited in terms of section 74(2) of the WCA. Both parties - that is: the employer and the works council - shall refrain from activities that interfere with operations or imperil peace in the establishment.<sup>265</sup>

The WCA provides for the establishment of a conciliation committee ('Einigungsstelle') as a dispute resolution mechanism. If agreement is not reached between the parties, matters of joint decision-making (relating to social aspects of the decision) can be referred to the conciliation committee for binding arbitration, whereas other matters (such as managerial aspects) can be referred to non-binding arbitration. A conciliation committee can either be set up as a dispute arises or the works council and the employer can establish a standing conciliation committee by works agreement.<sup>266</sup> The committee is composed of an equal number of assessors appointed by the employer and the works council as well as an independent chairman accepted by both parties.<sup>267</sup> In matters where the conciliation committee's award takes the place of the agreement between the employer and the works council, the conciliation committee must act at the request of either side.<sup>268</sup> In all other matters, the committee can only act if both sides so request or agree to its intervention.<sup>269</sup> In those cases the committee's award only takes the place of an agreement between the employer and the works council if both sides have accepted it in advance or accept it subsequently.<sup>270</sup>

The committee's award is subject to judicial control.<sup>271</sup> The employer as well as the works council may appeal to the labour court on the grounds that the conciliation committee has exceeded its powers. In matters of joint decision making, the application has to be made within two weeks of the date of notification of the award.<sup>272</sup>

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<sup>265</sup> Section 74(2) of the WCA.

<sup>266</sup> Section 76(1) of the WCA.

<sup>267</sup> Section 76(2) of the WCA.

<sup>268</sup> Section 76(5) of the WCA.

<sup>269</sup> Section 76(6) of the WCA.

<sup>270</sup> Section 76(6) of the WCA.

<sup>271</sup> T Kania op cit (n258) § 76 BetrVG para 28.

<sup>272</sup> Section 76(6) of the WCA.

### 3. Relationship between trade unions and works councils

#### a) Statutory framework

The WCA provides for a clear separation of powers and duties between the works council and trade unions. Works councils are organisationally separated from and independent of trade unions.<sup>273</sup> Section 2(3) of the WCA clarifies that the Act does not affect the functions of trade unions, particularly with regards to the representation of their members in the workplace, which serves to protect the trade unions' freedom of association as guaranteed in terms of article 9(3) of the German Basic Law.<sup>274</sup> Still, trade unions do not have the same power over works councils as trade unions in South Africa do over workplace forums.

According to the law, it is irrelevant for the election and operation of a works council whether a trade union is represented in the workplace. The establishment of works councils in theory does not depend on a trade union trigger but in practice, the initiative for the establishment of a works council often comes from a trade union.

The WCA provides for several rights of trade unions represented in the establishment. A trade union is represented in an establishment if it has at least one employee in the establishment as its member.<sup>275</sup> Regarding the establishment of a works council, trade unions have a right to initiate this. Pursuant to section 14(3) and (5) of the WCA, trade unions represented in the establishment are entitled to submit lists of candidates for the works council election. Further, trade unions have the power to ensure that an electoral board is appointed<sup>276</sup> and to contest an election that infringes the law before the labour court.<sup>277</sup>

Delegates from the trade unions represented in the establishment must, after notice is given to the employer, be granted access to the establishment in order to permit them to exercise the powers and duties established by this Act. Access may be denied only if it does run counter to essential operational requirements, mandatory safety rules or the protection of trade secrets.<sup>278</sup>

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<sup>273</sup> Richardi op cit (n227) § 2 para 37.

<sup>274</sup> Richardi op cit (n227) § 2 para 66.

<sup>275</sup> BAG 25.03.1992 – 7 ABR 65/90, NZA 1993, 134.

<sup>276</sup> Sections 16(2); 17(3), (4) and 18(1) of the WCA.

<sup>277</sup> Section 19(2) of the WCA.

<sup>278</sup> Section 2(2) of the WCA.

They are further entitled to attend all works and department meetings in an advisory capacity.<sup>279</sup> However, they may only attend meetings of the works council in an advisory capacity on request of one-fourth of the members of the works council.<sup>280</sup> In this event, the trade union representative is entitled to receive the agenda of the meeting and a copy of the minutes which concern it.<sup>281</sup> However, a representative trade union may require a works council to call a works meeting if no such meeting has been held during the preceding ‘calendar half year’.<sup>282</sup> For the purpose of fulfilling their duties and as far as their proper discharge so require the works council can, subject to an agreement with the employer, call on the advice of experts such as trade union officials.<sup>283</sup>

Representative trade unions are entitled to contest the outcome of a works council election in the labour court on certain procedural grounds.<sup>284</sup> Moreover, pursuant to section 23(1) of the WCA, a trade union may apply to the labour court for an order to remove from office any member of the works council or to dissolve the council on the grounds of grave dereliction of its statutory duties. Trade unions further are entitled to apply to the labour court for an order requiring the employer to cease and desist from an act, or to allow an act to be performed or to perform an act, where the employer has grossly violated his duties under the WCA.<sup>285</sup>

The primacy of collective bargaining is protected by section 77(3) of the WCA which provides that ‘works agreements shall not deal with remuneration and other conditions of employment that have been fixed or are normally fixed by collective agreement’. A matter is normally fixed in a collective agreement if the topic in question is normally bargained over. A collective agreement may, however, expressly authorise the making of supplementary works agreements by so-called opening clauses (‘Öffnungsklauseln’) in the collective agreement.<sup>286</sup>

Furthermore, the WCA provides that ‘the employer and the works council shall work together in a spirit of mutual trust having regard to the applicable collective agreements and in co-operation with the trade unions and employers’ associations represented in the establishment for the good

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<sup>279</sup> Section 46(1) of the WCA.

<sup>280</sup> Section 31 of the WCA.

<sup>281</sup> Section 34(2) of the WCA.

<sup>282</sup> Section 34(4) of the WCA.

<sup>283</sup> Section 80(3) of the WCA.

<sup>284</sup> Section 19 of the WCA.

<sup>285</sup> Section 23(3) of the WCA.

<sup>286</sup> Section 77(3)(2) of the WCA.

of the employees and of the establishment.<sup>287</sup> Section 2(3) of the WCA further stipulates that the Act shall not affect the functions of trade unions and employers associations, particularly the representation of their members' interests. These provisions serve as a framework for the interpretation of the parties' statutory rights and duties and explicitly safeguard the primacy of collective bargaining.

In summary, while trade unions have statutory initiating, supporting and controlling functions over works councils, works councils and both employee representation structures in Germany serve different functions and are institutionally and structurally separated.

### **b) Mutual benefit**

In practice, in Germany a close cooperation between trade unions and works councils in which both mutually benefit has emerged over years despite a very clear division of labour.

There is a clear separation between collective bargaining by trade unions on sectoral level and participation by works councils on plant level. This is done by way of separating presumably 'adversarial' issues such as distributive issues from 'non-adversarial' ones such as productivity issues. This division has not been predetermined by the nature of the issues in question but rather is an outcome of a complex and still ongoing process of interaction between all affected parties.<sup>288</sup> Distributive issues are concerned with the distribution of a company's profit between its shareholders, employees and other stakeholders in a broader sense and are inherently confrontational. On the other hand, both employees and management have the same concerns over the productivity and profitability of a company which makes joint problem solving possible and can lead to gains for both, having regards to job security, increased wages and increased profits.<sup>289</sup> While distributive issues are aimed at compelling one party to give up something, productivity issues are geared towards persuading both parties to realise a mutual gain.<sup>290</sup> Even though workers and employers compete for the returns of the company, they have a common interest in increasing the 'corporate cake'.

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<sup>287</sup> Section 2(1) of the WCA.

<sup>288</sup> Du Toit op cit (n180) 1555.

<sup>289</sup> Summers op cit (n171) 807.

<sup>290</sup> Klerck op cit (n7) 23.

The functions of collective bargaining agreements are limited by the functions of the works council which are statutorily defined in the WCA and which can be extended by agreement between the employer and the trade union.<sup>291</sup> Collective agreements are often concluded on sectoral/regional level, setting minimum standards for a whole sector as a framework, leaving the details of the day-to-day business in the company to the works councils on plant level. The adversarial nature of collective bargaining does not pass over to the discussion of workplace issues as neither plant managers nor plant representatives are involved in confrontational bargaining.<sup>292</sup> Workplace disputes are not resolved by strikes as works councils are barred by law from economic action in terms of section 74(2) of the WCA. Disputes are instead resolved by way of compulsory arbitration in the form of a conciliation committee.<sup>293</sup>

Usually, works agreements regulate the implementation and monitoring of standards set by collective agreement. If the employer by way of collective agreement agrees to reduce the weekly working hour in order to create new jobs for example, works councils are used to monitor the employer's adherence to the agreement and to make sure that the goal of creating new jobs is not counteracted by increasing the employees' overtime work.<sup>294</sup> Collective agreements, providing only a framework of minimum standards to be observed, further often leave the implementation thereof to the works councils through opening clauses which expressly authorise the works council and the employer to conclude supplementary works agreements, taking into account the specific characteristics of the company/workplace concerned.<sup>295</sup> Works agreements provide for more flexibility and can more easily be adjusted to changing conditions than collective agreements. A typical example would be a collective agreement regulating the average working time to be reached within a sector but leaving it to the works council to conclude an agreement about how the working time in each workplace will be distributed.<sup>296</sup> Generally, there is a tendency towards decentralisation in Germany enabling companies to more flexibly adapt to ever-changing conditions and to be competitive on the global market.<sup>297</sup>

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<sup>291</sup> Summers op cit (n171) 808.

<sup>292</sup> Summers op cit (n171) 807.

<sup>293</sup> See above p 48.

<sup>294</sup> Weiss op cit (n220) 164.

<sup>295</sup> Section 77(3), (2) of the WCA.

<sup>296</sup> Weiss op cit (n220) 165.

<sup>297</sup> Du Toit op cit (n180) 1557.

Trade unions and works councils are mutually dependent on each other. Although there is no requirement in law that for a works council to be elected there has to be a trade union present in the workplace, in practice it is often the trade unions that initiate the election process and provide employees with information about the benefits of having such an employee representation structure. As trade unions often present lists of candidates for the election, works council members in Germany, at least in part, often are trade union members.<sup>298</sup>

Numerous studies have shown that employee participation is most effective in representing the employees' interests in corporations that are highly unionised. It is suggested that without strong unionisation 'works councils are effectively taken over by management, whatever the legal rights conferred on employees'.<sup>299</sup> Further, works councils benefit from the trade unions' resources especially with regards to training. Works council members are entitled to attend training and educational courses insofar as necessary for the fulfilment of their duties.<sup>300</sup> These courses are often offered by trade unions at special training facilities where they train their own officials along with works council members. This joint training can facilitate communication and interaction between both actors, enabling them to lay down common interest and to reduce trade unions' suspicion and fear of works councils.<sup>301</sup>

At the same time, trade unions benefit from having a works council in the workplace. They are often used by trade unions to recruit union members. Employee participation structures can provide an opening for the collective organisation of workers.<sup>302</sup> According to Weiss, employees perceive works councils as trade union representatives in the workplace. They do not draw the distinction the law does by clearly separating these two institutions. In his words, 'the mere existence of works councils tends to create a climate in the establishment which makes the employees more inclined to abide to collective structures, thereby paving the way for actual trade union membership'.<sup>303</sup> Further, unions can gain from the knowledge and experience of highly skilled workers with regards to the production process, particularly in restructuring processes.<sup>304</sup> Work council members are constantly exposed to specific problems at the establishment and the

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<sup>298</sup> Section 14(3) of the WCA.

<sup>299</sup> Klerck op cit (n7) 27.

<sup>300</sup> Section 37(6), (7) of the WCA.

<sup>301</sup> Weiss op cit (n220) 163.

<sup>302</sup> Summers op cit (n171) 811.

<sup>303</sup> Weiss op cit (n220) 164.

<sup>304</sup> Klerck op cit (n7) 27.

acquired skills and experience and knowledge about day-to-day problems on workplace level can be put to good use by trade unions and their overall strategy.

All in all, today trade unions and works councils in Germany do not see each other as competitors but rather benefit from each other. In this regard, the preconditions in Germany and South Africa differ greatly.

#### **IV. DETERMINANTS FOR A LEGAL TRANSPLANT**

The Ministerial Legal Task Team responsible for the draft LRA drew extensively on international experience in the field of labour law. It was assisted by the International Labour Organisation as well as international experts such as Professor Weiss who is considered to have provided the impetus for the introduction of a worker representation system on workplace level, drawing on the German works council system. As analysed above, some ideas and concepts of the German system such as the election of a worker representation committee consisting of workers, were transplanted into the LRA, while other provisions such as the emphasis on representative trade unions were specifically tailored to the South African background and preconditions. This raises the general question whether and under what conditions legal concepts relating to collective labour relations can be transplanted from one system to another. The German scholar of labour and comparative law Otto Kahn-Freund said that 'rules and institutions relating to collective labour relations are usually too closely connected with the structure and organisation of political power in a particular environment to be successfully imported elsewhere'.<sup>305</sup> According to him, foreign law is usually used in the process of law making for three different reasons: First, the object of considering foreign law may be to prepare the international unification of the law, secondly, to give legal effect to a social change shared by the foreign country with one's own country and thirdly, to promote a social change which foreign law is designed to express or to produce.<sup>306</sup> The workplace forum system was introduced in order to achieve a co-operative dialogue between management and labour with the aim of improving productivity and competitiveness on the global market. It therefore falls under the third category which Kahn-Freund identifies as the most difficult one. With regard to labour relations, Kahn-Freund suggested that individual labour law such as rules on substantive terms of employment can be

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<sup>305</sup> Kahn-Freund op cit (n8).

<sup>306</sup> Kahn-Freund op cit (n8) 2.

transplanted easily, especially between countries which have reached similar stages of economic development, whereas collective labour law such as rules on collective bargaining and strikes cannot as they are inextricably linked to their social and especially political context.<sup>307</sup> Generally, comparative law can only be used for practical purposes if the context of the respective law is taken into account.<sup>308</sup> Bob Hepple, one of the experts involved in drafting the LRA, suggested that concepts and ideas but not specific institutions can be transplanted from one legal system into another provided that the following four essential requirements are met (1) a social consensus between business and labour, (2) an organic relationship between a specific social need and the form of the regulation adopted, (3) an internationalist and open-minded legal culture, and (4) the form of labour law adopted must contribute to improved national economic performance.<sup>309</sup> As pointed out above, both employers and trade unions opposed the introduction of statutory workplace forums as they were afraid of forfeiting their power<sup>310</sup> Thus, the first of Hepple's requirements is not satisfied. Concerns are also raised about whether employee participation actually leads to an increase in productivity and global competitiveness or rather is a hindrance to economic success.<sup>311</sup> Concepts cannot be extracted from a legal system without having regard to the logic of the foreign system, the interaction of its different elements and the historical context and all the factors that have led to the system as it presents itself today.<sup>312</sup> Hepple further suggests that once foreign concepts are incorporated into South African Law by legislation or judicial decision, they have to be interpreted in the light of the specific context and needs of South African labour relations.<sup>313</sup>

Bean has conducted research into cross national variations of employee participation structures and identifies the following four determinants: (1) domestic cultural and ideological factors, (2) differences in collective bargaining structures, (3) nature of the power relations between employers, trade unions and the state and (4) the particular historical circumstances in which employee participation structures were first introduced.<sup>314</sup> It is also important to note that

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<sup>307</sup> Kahn-Freund op cit (n8) 21.

<sup>308</sup> Kahn-Freund op cit (n8) 27.

<sup>309</sup> Hepple op cit (n8) 3.

<sup>310</sup> See above p 30.

<sup>311</sup> See above p 38.

<sup>312</sup> J Schregle 'Explaining Labour Law and Labour Relations to Foreigners: Some Reflections About International Comparison' in J Bellace and M Roods *Labour Law at the Crossroads: Changing Employment Relationships* (1997) 155, 157.

<sup>313</sup> Hepple op cit (n8) 9.

<sup>314</sup> Bean op cit (n8) 163-178.



employee participation structures have mostly been introduced in a situation of crisis: In South Africa, workplace forums were introduced to facilitate workplace democracy and increase productivity which was one of the objectives of the White Paper for a post-apartheid South Africa.

The social dynamics and labour market conditions in Southern Africa differ substantially from those in European first world countries such as Germany. According to Fenwick and Kalula who conducted a comparative study of Southern African and East Asian labour law in 2001, labour markets in Southern Africa are characterised by extreme income inequality often coinciding with racial differences, a high unemployment rate, a low skills level, massive poverty, large-scale labour migration and a vast informal economy in which a majority of the working people earn their living.<sup>315</sup> Labour Law therefore covers only a minority of the population, leaving most workers unprotected. While foreign labour law concepts aimed at protecting workers in the formal sector are still relevant, the authors suggest that labour law in Southern Africa has to develop an indigenous paradigm, focusing on job creation, control of immigration, training and education of workers and social security.<sup>316</sup>

Therefore, it is inconceivable to transplant a whole German concept of employee participation with all its provisions into the South African legal system. As was shown above, the preconditions such as the relationship between trade unions, employers and employees, the economic and cultural climate as well as the labour market at the time of the introduction of Chapter 5 into the LRA was and still is completely different. Provisions that succeeded in Germany will not necessarily have the same impetus in the South African context. The drafters of the LRA recognised this and made major changes to the German system, trying to adapt it to the South African context, for example by not restricting the right to strike; by making the representative trade union the only trigger for the establishment of the forum; and by allowing representative trade unions to force the employer to establish forums only in workplaces with more than 100 employees.

Since these provisions have failed and are still failing 22 years after their introduction in 1995, however, it is time to reconsider the legal framework and make long overdue changes.

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<sup>315</sup> Cited in Du Toit op cit (n31) 1424.

<sup>316</sup> Ibid.

## V. RECOMMENDATIONS

The following proposes several amendments to the LRA in an attempt to make statutory forums more attractive to both trade unions and employers and to facilitate a cooperative dialogue between management and labour.

### 1. Facilitate the establishment of workplace forums

**The establishment of workplace forums should be facilitated by lowering the threshold of 100 employees and by allowing not only the representative trade union but also minority unions, employees and employers to apply for its establishment.**

The application of the statutory provisions in Chapter 5 is starkly limited to only a small number of workplaces due to the threshold of 100 employers and the fact that only majority unions may apply for the establishment of a workplace forum.<sup>317</sup> To achieve workplace democracy and cooperative dialogue between trade unions and management instead of an adversarial environment at the workplace, the dependency of workplace forums on representative trade unions has to be abolished. In the current system, workplace forums will try to please the representative trade union as their existence is at the union's discretion. The dependency on a union for a workplace forum to be established disempowers non-unionised employees and severely threatens the promotion of the needs of the employees as a whole and the promotion of employee participation the LRA strives for.<sup>318</sup> It carries the danger that employees who are not members of the majority union may feel alienated from the participation process and not commit themselves fully to the forum.<sup>319</sup> Therefore, minority unions and employees in the workplace should be given the right to apply for the establishment of a forum along with representative trade unions.

Another contradiction in the system is revealed by the fact that in terms of the Act employers cannot initiate the establishment of workplace forums even though they are supposed to benefit both management and labour.<sup>320</sup> The only option for employers currently is to initiate non-statutory employee participation structures in the workplace, thereby putting pressure on

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<sup>317</sup> See above p 17.

<sup>318</sup> Botha op cit (n102) 1831.

<sup>319</sup> Manamela op cit (n9) 735.

<sup>320</sup> Wood and Mahabir op cit (n88) 235.

unions to secure their extensive rights regarding statutory workplace forums by establishing one in terms of the LRA.<sup>321</sup> As employers can benefit from the establishment from the forum too, they should also be given the right to initiate its establishments. Unions will be safeguarded by other measures such as the reintroduction of the duty to bargain.<sup>322</sup>

Moreover, the threshold of 100 employees in the current system has to be lowered so that the statutory provisions cover more workplaces. To protect smaller businesses, particularly the financial interests of start-ups, given the current economic situation and in order to avoid even further discouragement of foreign investment, a threshold closer to 20 employees would appear feasible

## **2. Exclude the right to strike**

**Workplace disputes should not be resolved by strikes but by a special dispute resolution mechanism.**

The LRA does not exclude the possibility for employees to strike if an agreement on consultation matters (section 84 of the LRA) is not reached. This introduces an adversarial element typically used by trade unions in a relationship that is aimed at being cooperative and blurs the distinction between distributive issues (subject to collective bargaining) and non-distributive issues (ideally dealt with by workplace forums). In the words of Olivier, ‘it is at the very essence of cooperative systems that parties should not be allowed to use their economic weapons when agreement cannot be reached, but rather to make use of appropriate alternative dispute resolution mechanisms’<sup>323</sup>. In Germany, the works council as well as the employer are barred by law from industrial action and they both shall refrain from any activities that interfere with operations or imperil the peace in the establishment.<sup>324</sup> The so-called ‘peace obligation’ has proven to be very efficient in keeping out the adversarial nature of collective bargaining from workplace level. This does not mean that negotiations between works councils and employers over workplace issues cannot get very heated and hostile, however, problems are not solved by the use of economic power but by negotiation and, as a final resort, by mediation and arbitration through the conciliation committee. The fact that the right to strike is not excluded for consultation matters

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<sup>321</sup> Ibid.

<sup>322</sup> See below p 61.

<sup>323</sup> Olivier op cit (n93) 813.

<sup>324</sup> Section 74(2) of the WCA.

makes workplace forums an extension of the collective bargaining system contrary to the intended institutional separation which allows for a cooperative relationship on workplace level.<sup>325</sup> The Act has introduced an alternative dispute resolution mechanism if the parties cannot agree on matters of joint-decision making.<sup>326</sup> Ideally, the right to strike should be excluded and a similar dispute resolution mechanism introduced for matters of consultation.<sup>327</sup>

### **3. Clear demarcation of collective bargaining and workplace forum structures**

**Trade Unions and workplace forums should be more clearly institutionally and structurally separated. Bargaining councils should be used for centralised bargaining.**

As shown above<sup>328</sup>, the provisions of the LRA lead to tension and a demarcation conflict, resulting from the coexistence of two systems of employee representation at the workplace level, workplace forums and plant level bargaining. Both representation structures are currently free to call for a strike to resolve disputes. The trade unions' fear of losing influence and power on plant level, together with the provision that only representative trade unions may initiate the establishment of workplace forums, is one of the reasons for the small number of forums established.

In order to prevent demarcation conflicts between trade unions and workplace forums, both employee participation structures should be clearly institutionally and structurally separated.<sup>329</sup> This separation has proven successful in Germany and is even more important in the South African context of adversarialism and trade unions losing influence and power. The LRA tries to keep these functions separate by promoting sectoral bargaining,<sup>330</sup> however, in practice, plant level bargaining often still is favoured by employers and especially small unions. Collective bargaining must be restricted to central levels, whereas workplace forums deal with the day-to-day-issues at plant level.<sup>331</sup> Bargaining councils can and should be used for centralised bargaining to avoid plant level bargaining. Unlike Summers suggested, there is no need to include a provision in the LRA that elected union representatives cannot be candidates for the

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<sup>325</sup> Klerck op cit (n7) 20.

<sup>326</sup> Section 86(4)-(8) of the LRA.

<sup>327</sup> Olivier op cit (n93) 814.

<sup>328</sup> See above p 29.

<sup>329</sup> Botha op cit (n102) 1819.

<sup>330</sup> Section 1(d)(ii) of the LRA.

<sup>331</sup> Olivier op cit (n93) 807.

workplace forum in order to achieve formal separation.<sup>332</sup> Forums will benefit from the shop stewards' knowledge and experience. However the option of a trade union based forum in which workplace forums consist merely of shop stewards<sup>333</sup> should be removed. Further, the boundaries for each representation structure and the issues for collective bargaining and those for workplace forums should be clearly statutory defined in order to avoid conflict resulting from an overlap of functions between these two institutions.<sup>334</sup> The matters for consultation and joint decision-making should be explicitly tabled in a code of good practice and the representative trade union and the employer should not be provided with the right to exclude these minimum rights in a collective agreement.

#### **4. Reduce the influence of majority unions and empower employees**

**Workplace forums should not merely be an extended arm of majority unions on workplace level as they are representing all employees in the workplace. Therefore, the influence of majority unions should be reduced and employees should be given more power.**

Another difficulty with the statutory provisions is that they put majority unions in a privilege position, in accordance with the general principle of majoritarianism favoured in the LRA<sup>335</sup>. The LRA gives majority trade unions extensive control over the establishment, functioning and dissolution of workplace forums.<sup>336</sup> In a trade union based forum in terms of section 81 of the LRA, for instance, the trade union chooses the representatives for the workplace forum. This provision undermines the notion of 'workplace democracy' the Chapter 5 strives for. A trade union based forum is just another union tool, in effect shop stewards are given the rights and functions in terms of Chapter 5.<sup>337</sup> Shop stewards are then occupying opposing roles which inevitably leads to a role conflict and hinders the shift to cooperative relationships on workplace level.<sup>338</sup>

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<sup>332</sup> Summers op cit (n171) 812.

<sup>333</sup> Section 81 of the LRA.

<sup>334</sup> Summers op cit (n171) 808.

<sup>335</sup> *Chamber of Mines v Association of Mineworkers of SA and Others* [2014] 35 ILJ 3111 (LC).

<sup>336</sup> See above p 29.

<sup>337</sup> Olivier op cit (n93) 811.

<sup>338</sup> Olivier op cit (n93) 812.

Workplace forums are entrusted with representing all employees in the workplace.<sup>339</sup> In order to fulfil their corporative function and to achieve workplace democracy, they have to be separated from the collective bargaining framework. To truly foster workplace democratisation, employees in the workplace rather than the representative trade union have to be provided with more rights and influence on the forum. Therefore, the following proposals are made:

- Section 81 of the LRA (trade union based workplace forum) should be removed.
- A certain number of employees should have the power to request a ballot to dissolve the workplace forum.
- There should be a list of inalienable, statutory defined matters for consultation and joint decision-making that cannot be removed by way of collective agreement.
- It is suggested that section 82(1)(f) of the LRA be removed: Once a workplace forum is established, it should remain in office unless dissolved on request of the employees. If the forum is elected by all employees and charged with representing the interests of all employees in the workplace, a change of the majority union cannot have any influence on the composition of the forum.
- Section 82(1)(v) of the LRA, according to which the representative trade union and the employer may, by agreement, change the constitution of the workplace forum, should be removed. This provision is not consistent with the basic idea of Chapter 5 that the provisions of the constitution are ideally based on a collective agreement agreed upon between the employer, the majority union and any registered trade union that has members employed in the workplace.<sup>340</sup> This leads to the obvious question why a majority union should be empowered to change the constitution without the consent of other unions.

## **5. Reintroduce the duty to bargain on sectoral level**

**The duty to bargain should be reintroduced on sectoral level to strengthen trade unions and reduce their fear of workplace forums.**

The duty to bargain, developed under the Labour Relations Act 57 of 1981, was replaced in 1995 by a system that promotes collective bargaining ‘by providing a series of organisational rights for

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<sup>339</sup> Section 79(a) of the LRA.

<sup>340</sup> Section 80(9), (7) of the LRA.

unions and by fully protecting the right to strike'.<sup>341</sup> However, due to the decrease in trade union membership and collective bargaining coverage, trade unions are weakened and often lack the economic power to compel the employer to bargain seriously. This culminated in the collapse of the collective bargaining system in the mining industry and the Marikana massacre in 2012. Workers use violence during strikes as it has proven effective throughout the years. They feel powerless and violence is often seen as the only way to get attention.<sup>342</sup> In contrast, trade unions in Germany are economically powerful and prosperous and often succeed in wage negotiations.

Against this backdrop, it is discussed whether the duty to bargain should be reintroduced to secure the trade unions' right to collective bargaining<sup>343</sup> and to counterbalance the loss of union power. Once unions are perceived as more powerful by workers, the membership number will also increase which, in turn, strengthens unions. To avoid conflicts between unions and workplace forums on workplace level, the duty to bargain should be restricted to bargaining on sectoral level. The reintroduction of a duty to bargain might reduce the unions' fear and mistrust towards other forms of employee representation on workplace level and pave the way for unions to engage more enthusiastically in the establishment of workplace forums.<sup>344</sup>

## **6. Provide for binding works agreements**

**Chapter 5 should provide for a legally binding and enforceable agreement between the workplace forum and the employer.**

The current system does not facilitate management and workplace forums to conclude legally binding agreements. The consensus reached between the parties can only have legal effect to the extent that it is incorporated in a binding workplace rule, contracts of employment or a subsequent collective agreement. Relying on a collective agreement makes the parties dependent on trade unions and having to incorporate rules in the employment contracts defeats the purpose of collective participation. Hence, to facilitate employee participation in the workplace independent from trade unions, statutory provision for legally binding agreements between the parties, similar to those in Germany<sup>345</sup>, should be included in Chapter 5. This strengthens the

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<sup>341</sup> Explanatory Memorandum op cit (n1) 293.

<sup>342</sup> T Ngcukaitobi op cit (n55) 848.

<sup>343</sup> Constitutionally protected in section 23(5) of the Constitution of the Republic of South Africa 108 of 1996.

<sup>344</sup> Steadman op cit (n3) 1200.

<sup>345</sup> See above p 48.

rights of workplace forums and simplifies the enforcement of the consensus reached between the parties. Further, works agreements provide more legal certainty and reduce conflicts about what the parties agreed on.

## **7. Give workplace forums the right to initiate consultation and joint-decision making**

**Workplace forums should not be excluded from the right to initiate the consultation and joint decision making process.**

In the current system, the right to initiate the consultation and joint decision-making process is restricted to employers. The workplace forum cannot raise new issues. This departure from international law was intended to appease employers' concerns about interference with their management prerogative.<sup>346</sup> However, it is incompatible with the idea of cooperation the introduction of employee participation is based on. The current system risks management seeing employee participation as a mere formality without truly engaging in the process. Giving the forum the right to initiate the process strengthens employees and puts pressure on employers to take the process seriously. Further, due to their special knowledge and experience about the production process, employees might have suggestions for improvement management can benefit from economically.

## **8. Promote non-statutory participation structures**

**Employee participation should not be made entirely voluntary. However, the emphasis on individual non-statutory structures should be maintained.**

One of the main principles underpinning the LRA is the principle of voluntarism. The LRA does not impose a duty to bargain on the employer<sup>347</sup> and the bargaining council system is a voluntary system. The fact that non-statutory employee participation structures flourished after the introduction of workplace forums is evidence of the parties' (employers as well as trade unions) preference to voluntarist industrial relation systems.<sup>348</sup> Therefore, some authors suggest that chapter 5 should be removed from the LRA entirely as workplace forums should be voluntary

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<sup>346</sup> Du Toit op cit (n70) 404.

<sup>347</sup> Explanatory Memorandum op cit (n1) 292.

<sup>348</sup> Steadman op cit (n3) 1195.



structures triggered by both parties.<sup>349</sup> However, the LRA currently places a great emphasis on individual structures already: Chapter 5 does not exclude non-statutory forums and even if the representative trade union applied for the establishment of a workplace forum in terms of section 80(2) of the LRA, the provisions only apply if the parties cannot agree on an individual structure determined in a collective agreement.<sup>350</sup> Even if employers and trade unions do not see a benefit in establishing a workplace forum yet as South African workplaces cannot draw upon positive experience with forums, they at least serve as an incentive to establish voluntary structures as studies have shown.<sup>351</sup> Once voluntary structures prove to be successful, all parties in the workplace might become more open to employee participation and cooperation in general. Therefore, I do not agree that Chapter 5 should be removed entirely from the LRA. Rather, the emphasis on voluntary and individual structures, tailored to the relationships in the respective workplace, should be maintained.

## VI. CONCLUSION

Studies into voluntary employee participation structures in South Africa provide evidence that participation by unions and employee representatives in consultation and joint decision-making can be meaningful and effective and have a positive effect on workplace efficiency, workplace relationships and economic sustainability.<sup>352</sup> Thus, the policy objectives of the legislator are in principle achievable in the South African context. However, the statutory system provided for in Chapter 5 of the LRA has been of very little significance in the past 22 years. Labour relations are still adversarial and trade unions are weak and fear that workplace forums might further undermine and weaken their position in the workplace. Amendments to Chapter 5 are long overdue.

This thesis proposes to amend the LRA, having regard to the German provisions providing for works councils in establishments with five or more employees. Legal systems emerge under different legal, social and economic circumstances and can therefore not blindly be transplanted from one legal system to another. The preconditions such as the relationship between trade unions, employers and employees, the economic climate as well as the labour

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<sup>349</sup> Steadman op cit (n3) 1997; Brand and Brassey op cit (n207); Brassey and Brand op cit (n173).

<sup>350</sup> Section 80(7) of the LRA.

<sup>351</sup> Steadman op cit (n3) 1191.

<sup>352</sup> Steadman op cit (n3) 1189, 1196.

market in South Africa was – at the time of the introduction of the new LRA – and still is completely different from the situation in Germany. Still, provided that these different backgrounds are kept in mind, comparative studies into the success story of works councils in Germany can contribute to developing a participation system that might be more attractive to both employers and trade unions. It is therefore recommended to adapt some German ideas/concepts, while other changes such as the reintroduction of the duty to bargain are specifically tailored to the South African context.

Knudsen, comparing employee participation structures in Europe, identified the following three preconditions for an employee participation structure to be successful in the long-term<sup>353</sup>: First, employer and employees have to recognise each other as parties with divergent but legitimate interests, meaning that employees recognise the prosperity of the company as important, whereas employers see job security and well-being of employees as important. Secondly, both parties must see a benefit in moving away from adversarialism to cooperation. Lastly, the relationship between the parties has to be characterised by mutual trust: Employers must trust workers to have the necessary skills to participate in decision-making and not to misuse their increased power influence and, at the same time, employees must trust management not to be excluded from the benefits of their effort.<sup>354</sup> It is further suggested that as greater trust develops between the workplace forum, trade unions and the employer, all parties will be more comfortable that the forum deals with a greater number of issues.<sup>355</sup> It seems as if South Africa still lacks these preconditions, in particular the trust relationship between labour and management. German history has shown, however, that a change of perceptions is possible, given that both parties ultimately benefit from employee participation structures. Apart from changes in legislation, therefore, effort should be put into educating all parties of the benefits of worker participation. The CCMA can be used to equip employees with the necessary skills.

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<sup>353</sup> Knudsen op cit (n5) 27 as cited in Steadman op cit (n3) 1193.

<sup>354</sup> J Rogers and W Streeck 'Workplace representation overseas: The works council story' in RB Freeman *Working Under Different Rules* (1994) 106.

<sup>355</sup> Steadman op cit (n3) 1198.

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